No. 137 No. 12920

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IN THE

United States Court of Appeals for the Sixth Circuit

INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW-CIO), a labor organization, and BENTON HARBOR MALLEABLE LOCAL No. 880 of International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO), a labor organization,
Defendants and Appellants,

vs.

BENTON HARBOR MALLEABLE INDUSTRIES, a corporation,
Plaintiff and Appellee

LIBRARY SUPREME COURT, U.S.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

BRIEF OF DEFENDANTS AND APPELLANTS and APPENDIX

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REDMOND H. ROCHE, JR.
Attorney for Defendants and Appellants,
8000 East Jefferson Avenue,
Detroit 14, Michigan.

HAROLD A. CRANEFIELD,
Of Counsel,
8000 East Jefferson Avenue,
Detroit 14, Michigan.

STATEMENT OF QUESTIONS INVOLVED

1. Should the appellee's action be stayed pursuant to Section 3 of the United States Arbitration Act while the question of whether there is any issue referable to arbitration involved in appellee's cause of action is decided, in the first instance, by an arbitrator?

District Court answered "No".
Appellants contend the answer should be "Yes".

2. Should the appellee's action be stayed pursuant to Section 3 of the United States Arbitration Act because there are, as a matter of law, one or more issues referable to arbitration involved in appellee's cause of action?

District Court answered "No".
Appellants contend the answer should be "Yes".

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*Not yet available in Federal Reporter.

**Citation is to Labor Arbitration Reports published by Bureau of National Affairs; case not yet available in New York Supplement.

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No.....

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Defendants and Appellants,

vs.

BENTON HARBOR MALLEABLE INDUSTRIES, a corporation,
Plaintiff and Appellee

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

BRIEF OF DEFENDANTS AND APPELLANTS

STATEMENT OF FACTS

On June 24, 1952, plaintiff-appellee filed a civil complaint against defendants-appellants alleging in substance two separate breaches of contract. These allegations of breach were based upon the claim that strikes in March and June of 1952 were in breach of a "no-strike" covenant in the collective bargaining agreement of February 26, 1952 then existing between the appellee and appellants. On May 13, 1953, appellee filed an amended and supplemental complaint reiterating the allegations of the original complaint and adding an allegation of a breach of the "no-strike" covenant involving a strike commencing in April of 1953 (App. 2a-13a).

On June 3rd, 1953, appellants filed a motion to dismiss the action or, in the alternative, to stay proceedings pending arbitration pursuant to Section 3 of the United States Arbitration Act, (Title 9 U. S. C.)[1] (App. 16a-20a). Subsequent to June 3, 1953, there were proceedings involving both appellee's attempt to invoke discovery proceedings and an amended motion to dismiss, or in the alternative stay, filed by appellants; proceedings which are not involved in this appeal. The amended motion did not affect that part of the original motion which was concerned with appellants' alternative position (i.e., to stay proceedings pending arbitration) and therefore is not relevant to this appeal.

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[1] "If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

On May 28, 1956, the District Court handed down an opinion (App. 20a-28a) which, among other things, denied appellants' amended motion to dismiss on all grounds, and, further, denied appellants' alternative motion to stay proceedings pending arbitration. On the same date, an order was entered in accordance with said opinion (App. 1a, Relevant Docket Entries).

Appellants herein appeal only from that portion of the decision and order which denies appellants' alternative motion to stay pending arbitration. Such is the only part of the decision and order which is appealable at this time. The determination by the District Court, and the review by this Court, of the merits of said motion to stay necessarily must be based upon appellee's amended and supplemental complaint (App. 2a-13a). The pertinent part of that complaint is paragraph 12 thereof which recites the alleged breaches of contract. Attached to said complaint as an exhibit thereto was the collective bargaining contract alleged to have been entered into between appellee and appellants on the 26th day of February, 1952,[2]. Articles I, II, III, VI and XI of said collective bargaining contract are included in the Appendix at pages 8a-13a.

Also included in the Appendix at pages 14a-15a is a one-page supplement to said collective bargaining agreement of February 26, 1952, which supplement is dated February 29, 1952. This supplement was not included as an exhibit to appellee's supplemental complaint and has not formally been introduced into the record. It would normally be

[2] Appellants moved to dismiss as to the International Union on the ground that it appears on the face of the contract that the International is not a party. This point, however, is irrelevant to this appeal, and for purposes of this appeal, we need not distinguish between appellants as contracting parties.

attached to appellants' answer and an answer has not as yet been filed. However, a copy of this supplement was attached to one of appellants' briefs to the District Court as an appendix thereto without any objection by appellee. The authenticity of this supplement is not in question, its genuineness having been admitted by the appellee's attorney at the oral argument in this matter held before the District Court on December 2nd, 1954 when a photostat of the supplement was exhibited to the presiding judge.

The breaches of contract alleged by appellee are set forth as violations of Article III, Section 1 of said contract of February 26, 1952 (App. 10a-12a). This Article is entitled "Grievance Procedure".[3] Said Section 1 also

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[3] Section 1 of Article III provides:

"Shall differences arise between the Company and the Union as to the meaning and application of this Agreement, or should any local trouble arise, an earnest effort shall be made to settle such differences, and it is agreed by the Union that there shall be no strike, slowdown or stoppage of work on the part of the Union or its members and there shall be no lockout on the part of the Company during the term of this contract. The parties shall in all instances resort to the following steps of the grievance procedure."

Sections 2, 3 and 4 set forth various stages of a normal grievance procedure; Section 2 providing for discussion between an employee and/or his steward, and the department foreman; Section 3 providing for discussion between an employee's division committeeman and the employer's divisional superintendent; Section 4 providing specifically for grievances pertaining to a disputed production rate and setting forth a joint time study procedure with regard thereto.

Sections 5 and 6 provide:

5. "If any grienvance cannot be settled between the divisional superintendent or designated representative of Management and the Committeeman, within two working days, it shall be referred to the Shop Committee and Management for disposition."

6. "In the event any grievance relating to the meaning or application of this Agreement is not satisfactorily disposed of in the foregoing steps of the grievance procedure, either party may sub-

(Continued on next page)

introduced a procedure for settling "differences * * * between the Company and the Union as to the meaning and application of this agreement", culminating in Section 6 which provides for an impartial arbitrator to which "either party may submit the unsettled grievance".

This appeal revolves about two very specific contentions of appellants. They are:

1. Appellants' claim that the cause of action involves issues subject to arbitration under Section 6 of Article III of the contract of February 26, 1952 is itself arbitrable.

2. Alternatively appellants' claim that appellee's cause of action involved issues arbitrable under Section 6 of Article III of the contract of February 26, 1952 is, as a matter of law, correct, and the dispute should have been submitted initially to an arbitrator rather than the District Court.

(Continued from preceding page)

mit the unsettled grievance to an impartial arbitrator agreed upon by them provided notice is given to the opposite party within fifteen (15) days after the Shop Committee-Management meeting (above referred to) of intention to arbitrate. The parties shall bear equally the expenses of arbitrartion. The Arbitrators shall have no power to add to, ignore or modify any terms of this Agreement. His decision shall be final and binding upon both parties of this Agreement."

ARGUMENT

1. SHOULD THE APPELLEE'S ACTION BE STAYED PURSUANT TO SECTION 3 OF THE UNITED STATES ARBITRATION ACT WHILE THE QUESTION OF WHETHER THERE IS AN ISSUE REFERABLE TO ARBITRATION INVOLVED IN APPELLEE'S CAUSE OF ACTION IS DECIDED, IN THE FIRST INSTANCE, BY AN ARBITRATOR?

District Court answered "No".
Appellants contend the answer should be "Yes".

Appellants contend that modern methods of arbitration require that the primary decision as to what is arbitrable be itself left to an arbitrator operating under the contract, the court confining itself to granting a stay pending arbitration, following which the court would, if so requested by either party, review the arbitration award including the arbitrator's decision on arbitrability; i.e. on his own jurisdiction.

Though this contract does not specify what rules or regulations govern a question submitted to arbitration, it may properly be assumed that the parties intended the rules of the American Arbitration Association to apply. The fact that no such specific provision is made is unimportant. As is stated in *3 Collective Bargaining Negotiations and Contracts* (Bureau of National Affairs) 51:301:

> "Most arbitration services are obtained from such well established private agencies as the American Arbitration Association, or from federal or from state agencies. * * * All such agencies have their own standardized rules for procedure and for conducting arbitration proceedings. Possibly as a result of this fact, clauses specifying rules and pro-

cedures for the conduct of arbitral hearings, for submissions, for obtaining evidence, etc., are relatively infrequent."

As a matter of practice today, it may be assumed that all arbitration agreements, not specifically otherwise providing, are intended to be governed by the rules of the American Arbitration Association. One of the most important rules of that association is that the question of arbitrability is to be decided by the arbitrator. (See *Textile Workers Union v. Aleo Manufacturing Co.*, 94 F. Supp. 626, (D. C., N. C., 1950), reviewing and preliminarily approving the arbitrator's decision in *Matter of Aleo Manufacturing Co.*, 15 Labor Arbitration Reports 715).

When faced with a similar problem in *Auto Workers Local 379 v. Jacobs Manufacturing Co.*, 120 F. Supp. 228 (D. C. Conn., 1953) the court very succinctly posed the question herein involved in the following words:

> "Consideration of this question, however, involves first passing on the question of the arbitration panel's jurisdiction to decide jurisdiction. That is to say, should the case go to the arbitration panel for them to decide whether they have jurisdiction over the dispute? If the court's decision on this question is in the affirmative, then the court need not consider the merits of the jurisdictional question * * *."

The court there squarely answered the question in the affirmative where the contract, as in our case, provided for arbitration of disputes concerning the "meaning and application" of the contract.

Post Publishing Company v. Cort, 134 N. E. 2 431, ..., a very recent decision by the Massachusetts Su-

preme Judicial Court (May 29, 1956), is in full accord with the postion of the District Court in *Auto Workers Local 379 v. Jacobs Manufacturing Co., supra.*

Chief Judge Magruder, of the First Circuit, in *United Electrical Workers v. General Electric Company*, 233 F. 2 85, decided April 25, 1956, concluding a very exhaustive treatment of the question of a federal court enforcing an agreement to arbitrate, gives specific consideration to this precise question. Judge Magruder states:

> "* * * [An] arbitration clause, either expressly or by broadly stating its scope to include disputed interpretations of any contract term, may refer the very question of arbitrability to the arbitrator for decision. That is, just as a court has jurisdiction to determine its own jurisdiction, the arbitrator in such a case has power to interpret the scope of the arbitration terms of the contract, including questions of whether the dispute at issue is made arbitrable * * *."

The decision goes on to examine both possibilities and to provide against misuse of the doctrine of initial decision on arbitrability by the arbitrator, stating that if "the applicant's claim of arbitrability is not frivolous or patently baseless, an order can be given, with the decision on arbitrability to be made in the arbitration proceedings that follow". Citing *Auto Workers Local 379 v. Jacobs Manufacturing Company, supra.*

It can scarcely be contended that appellants' position is frivolous. In the *Jacobs* and *Post* cases, *supra*, in both of which the courts held that, to paraphrase Judge Magruder's language, the arbitration clause was sufficiently broad to include the dispute over the arbitrability controversy, the coverage of the arbitration language was substantially identical with that of the contract under con-

sideration herein. In *Post*, the pertinent phrase was "grievances or disputes arising from the application of this agreement". To the extent that this language defining the scope of arbitration in the clause therein under consideration differs from the language of the contract herein, the latter is substantially broader.

The key language on the scope of arbitration in the subject contract appears in Sections 1 and 6 of Article III (App. 10a, 11a). Section 1 commences with the statement that "Shall differences arise between the Company and the Union as to the meaning and application of this Agreement * * *". Section 1, after prohibiting strikes, lockouts, etc., concludes with the statement that "The parties shall in all instances resort to the following steps of the grievance procedure". Sections 2 through 5 set forth the tradtional steps of a grievance procedure. (See footnote 3, *infra*, p. 4.) The key language in Section 6 states that:

> "In the event any grievance relating to the meaning or application of this agreement is not satisfactorily disposed of in the foregoing steps of the grievance procedure, either party may submit the unsettled grievance to an impartial arbitrator * * *."

The only difference between the key language in Section 6 and the introductory language of Section 1 is that Section 6 uses the word "grievance" as the obvious equivalent of "difference" in Section 1.[4]

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[4] Appellants discuss more fully in the subsequent portion of this brief (p. 18) their contention that the pertinent language of Article III of the contract herein is sufficiently broad to provide as a matter of law, for arbitration of the issues involved in appellee's cause of action. On the point here being argued, we need only be concerned with establishing that our claim that these issues are arbitrable is neither "frivolous or patently baseless".

Since Article III sets forth a procedure, culminating in arbitration, for deciding "differences * * * between the Company and the Union as to the meaning and application of this agreement", and since the question of the meaning and application (or put another way, the *scope*) of the arbitration provision contained in Section 6 of the contract is at issue between the parties, there would seem to be no reason for denying appellants the right to have the initial decision as to the scope of the arbitration provision in Section 6 decided, pursuant to the direction of the contract, by an arbitrator.

As the courts have held in the foregoing cited case, in the face of such a broadly worded arbitration provision, it is a subversion of the parties' own agreement for the Court to make the initial decision on arbitrability. Appellants contend that this is the very type of situation Judge Magruder referred to when he pointed out the correctness, in such a situation, of referring the issue of arbitrability itself to an arbitrator. No practical difficulties arise even in the event a court should subsequently reverse an arbitrator's decision that the substantive issue was arbitrable, for Justice Wilkins in *Post Publishing Co. v. Cort, supra,* points out that:

> "We see no occasion to interrupt the normal course of the arbitration procedure voluntarily adopted by the parties themselves. In so deciding, we venture no statement as to the validity of any award. See *Burns v. Thomas Cook and Sons, Inc.*, 317 Mass. 398, 401, and [citing cases]. Parties may raise before an arbitrator a challenge to his jurisdiction and, without waiving that question may proceed to a hearing on the merits. The arbitrator should decide the jurisdictional question in the first instance, while the right to a judicial determination will be preserved. [Citing cases.] We see no ir-

> reparable injury in first, as promised, carrying out arbitration before the initial tribunal contemplated in the agreement."

The Arbitrator's decision as to the "meaning and application" of the arbitration section of Article III would, of course, be subject to review by the Court. Since it would be a decision based more upon law than findings of fact, the Court would be influenced by the arbitrator's decision only to the extent the Court felt the decision deserved consideration because of the skill, expertise and first-hand knowledge of the arbitrator involved as reflected in the logic and rationale of his decision. Appellants contend, nonetheless, that they are entitled to the fruits of their bargain, and that, whatever weight the Court would eventually give it, appellants are entitled to have the initial decision on the question of arbitrability decided by an arbitrator appointed pursuant to the contract.

Appellants contend that the policy they advocate (i.e., referring the jurisdictional issue of arbitrability to the arbitrator for initial decision where the arbitration clause is suitably broad) is completely consistent with, and in furtherance of, the public policy favoring arbitration as reflected by the enactment in 1925, of the United States Arbitration Act, and by numerous subsequent decisions of many courts.

Such arbitration machinery, when agreed to by the parties, is clearly in the public interest and constitutes a long step forward in promoting a basic purpose of the Labor Management Relations Act of 1947, 29 U. S. C. A. 141 *et seq.* namely, to bring about peaceful solutions of labor disputes by procedures established by collective bargaining. Thus, as was stated in *Lewittes and Sons v. United Furniture Workers*, 95 F. Supp. 851 (D. C. N. Y. 1951):

"The courts should be reluctant to strike down a clause which appears to promote peaceful labor relations rather than otherwise". Both labor and management have recognized the efficacy of arbitration for settling of labor disputes as is indicated by the fact that 80% of all collective bargaining contracts have arbitration clauses: *3 Collective Bargaining and Negotiations*, (Bureau of National Affairs) 71:1.

2. SHOULD APPELLEE'S ACTION BE STAYED PURSUANT TO SECTION 3 OF THE UNITED STATES ARBITRATION ACT BECAUSE THERE ARE, AS A MATTER OF LAW, ONE OR MORE ISSUES REFERABLE TO ARBITRATION INVOLVED IN APPELLEE'S CAUSE OF ACTION?

District Court answered "No".
Appellants contend the answer should be "Yes".

In the event this Court should hold that the issue of arbitrability of the controversy is not itself referable to arbitration, appellants contend that this Court should conclude that the issues tendered by appellee's complaint are arbitrable as a matter of law under Sections 1 through 6 of Article III of the contract pleaded. (App. 10a-11a.)

Basically, appellee complains that appellants, on a number of occasions, have breached the no-strike provision contained in Article III, Section 1 of the collective bargaining contract between appellee and appellants and that appellee has suffered financial damage as a consequence of said alleged breaches. Said Section 1 provides:

> "Shall differences arise between the Company and the Union as to the meaning and application of this Agreement, or should any local trouble arise, an earnest effort shall be made to settle such differ-

ences, *and it is agreed by the Union that there shall be no strike, slowdown or stoppage of work on the part of the Union or its members and there shall be no lockout on the part of the Company during the term of this contract.*" The parties shall in all instances resort to the following steps of the grievance procedure:" (Emphasis supplied.)

Any decision on appellee's claim for damages involves, of course; determinations as to the "meaning" of various provisions of the contract, and, particularly, a determination of the scope of the no-strike clause of Article III, Section 1 thereof.[5]

Any decision on the appellee's cause of action will also necessitate an "application" of the pertinent provisions of the collective bargaining contract, properly construed as to meaning, to the facts surrounding the alleged breaches.[6]

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[5] Determination of the meaning of the no-strike clause is, in itself, a difficult question. That there are implied exceptions to such a prohibition against strikes is well established though the precise nature of those exceptions in any given case varies with the language of the contract as well as the collective bargaining history and other related factors, *Mastro Plastics Corporation v. N. L. R. B.*, 214 F. 2d 462 (2 C. A. 1954) aff. 76 S. Ct. 349 (1956). *N. L. R. B. v. Wagner Iron Works, et al.*, 220 F. 2d 126 (C. A. 7. 1955); cert. denied 76 S. Ct. 466 (1956).

With regard to the strike alleged to have commenced in April of 1953 (the strike from which most of appellee's alleged damages apparently flow), determination of the contractual strike prohibition is further complicated by the necessity of construing said prohibition in connection with the provision of the February 29, 1952 Supplemental Agreement (App. 14a-15a) which contains an express exception to the contractual strike prohibition.

[6] The decisions in *Mastro Plastics Corp. v. N. L. R. B.* and *N. L. R. B. v. Wagner Iron Works, supra*, incidentally, have particular bearing upon the strike appellee alleges to have taken place in June of 1952. At such time as appellants file their answer herein framing more precisely the issues involved in the action, the appellee's precipitate discharge of the entire union shop committee prior to the cessation of work in June of 1952 will have a very substantial bearing on the question of whether that alleged strike was, in fact, a breach of the strike prohibition clause properly interpreted as to scope.

It would seem, then, than the issues raised by appellee's complaint are issues over which differences as to the "meaning and application" of the agreement have arisen between the parties. As set forth in detail in this argument both *supra* and *infra* (See pp. 9-10, 18-20), Section 6 of the contract providing arbitration of "any grievance relating to the meaning or application of this agreement" at the request of "either party" is necessarily equivalent, in scope, to the provision in Section 1 which introduces the procedure culminating in Section 6, a procedure clearly intended to settle, by arbitration if necessary, "differences [arising] between the company and the union as to the meaning and application of this agreement."

It would appear, therefore, that appellants are entitled to a stay of proceedings pending arbitration of the issues raised by appellee's complaint. This problem has been before a number of courts for decision. Stays have been ordered in many of these cases. See *Signal-Stat Corporation v. U. E.*, 38 L. R. R. M. 2378 (2 C. A. July 2, 1956)[7]; *Regent Quality Furniture Company v. Pollack*, 26 L A. 302 (N. Y. Sup. Ct. April 13, 1956)[7a]; *Lewittes and Sons v. United Furniture Workers*, 95 F. Supp. 851 (D. C. N. Y. 1951); *Brady Transfer and Storage Company v. Meat Drivers Union*, 30 L. R. R. M. 2535 (D. C. Ill. 1952)[7b]; *Pennsylvania Greyhound Lines v. Amalgamated Association of Motor Coach Employees*, 98 F. Supp. 789, (D. C. 1951); reversed on other grounds, 193 F. 2d 327 (C. A. 3, 1952).

The most recent of these decisions is *Signal-Stat Corporation v. U. E.*, 38 L. R. R. M. 2378 (C. A. 2, July 2, 1956). The grievance procedure there provided, in part:

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[7] Not yet available in Federal Reporter.

[7a] Citation is to Labor Arbitration Reports published by Bureau of National Affairs; case not yet available in New York Supplement.

[7b] Citation is to Labor Relations Reference Manual published by Bureau of National Affairs; not reported in the Federal Supplement.

> "All disputes, grievances or differences that may arise between the parties of this agreement shall promptly be filed in writing. * * * If no satisfactory settlement is arrived at, within 10 days of filing of said grievance, then the difference, dispute or grievance shall, at the request of either party, be immediately submitted for arbitration. * * *"

In the face of this procedure, the company brought action against the union for breach of the no-strike clause. The union sought a stay pursuant to Section 3 of the United States Arbitration Act, and the District Court denied the stay. On appeal, the Second Court of Appeals, speaking through Judge Frank, reversed the District Court and ordered a stay of proceedings pending arbitration. The Court stated:

> "We think the broad arbitration clause in the collective bargaining agreement here involved covers a dispute relating to an alleged breach of the no-strike clause. Under the agreement, 'All disputes, grievances or differences' are arbitrable. We can hardly imagine more broadly inclusive language. This phraseology distinguishes the instant case from *Markel Electric Products v. United Electric, E. & R. Workers* [202 F. 2d 435 (C. A. 2 1953)]. To the extent that the other cases cited by plaintiff require a contrary result, we think them erroneous. [Citing *United Electric R. & M. Workers v. Miller Metal Products*, 215 F. 2d 221, (C. A. 4); *International Union v. Colonial Hardwood Floor Co.*, 168 F. 2d 33, 35, 2102 (C. A. 4); *Square D Co. v. United Electric R. & M. Workers*, 123 F. Supp. 776, 2627.] We think their interpretations of similar arbitration clauses are unduly restrictive and achieve, by indirection, the same result as the old, and now generally rejected, judicial aversion to enforcing arbitration agreements. Cf. *Kulukundis Shipping Co. v. Am-*

torg Trading Co., 126 F. 2d 978, 983-85 (C. A. 2). Other cases, with which we agree, support our decision that the instant arbitrartion agreement covers a dispute arising from an alleged breach of the no-strike clause. See e. g., *Lewittes & Sons v. United Furniture Workers of America, CIO*, 95 F. Supp. 851, 853-54, (S. D. N. Y.); *Pennsylvania Greyhound Lines v. Amalgamated Ass'n*, 98 F. Supp. 789, 791, reversed on other grounds, 193 F. 2d 327, (C. A. 3); *Hudson Wholesale Grocery Co. v. Allied Trades Comm.*, 65 A. 2d 557, 559, (N. J. Ch.)."

The basis on which the Court distinguished *Markel Electric Products v. United Electrical Workers* is significant. The arbitration provisions in *Markel* are distinguishable both from the arbitration provisions in *Signal-Stat* and from those contained in the contract pleaded herein on two identical points. In *Markel*, the contract set forth a grievance and arbitration procedure for any difference between "the company and any employee". In contrast, the contractual language in both *Signal-Stat* and the instant case provide a grievance procedure and arbitration for differences between "the company and the union" or, "the parties". The Court's language in the *Markel* case illustrates how important to the decision therein reached was the contractual limitation the Court found to arise from the express limitation of the grievance and arbitration procedure to differences between "the company and any employee". The second, and even more important, distinction between the contractual language in *Markel*, and that involved in both *Signal-Stat* and the instant case, is the provision for submitting an unsettled grievance to arbitration. In *Markel*, the contract provided only that the party "filing" the grievance could submit the same to arbitration. Contrast such language with that involved

in the instant case and *Signal-Stat* where, in each, it is provided that "either party" may submit the unsettled grievance to arbitration.

These basic differences in the contractual language between the *Markel* case, on the one hand, and both *Signal-Stat* and the instant case, on the other, naturally lead to differing results. The entire thrust of the *Markel* opinion relied, basically, upon explicit language which limited the grievance and arbitration procedure to disputes of such a nature as would arise between an individual employee and the company; i.e. disputes of the nature that this Court had in mind in its consideration of the term "grievance" in *Hoover Motor Express Company v. Teamsters Union Local 327*, 217 F. 2d 49. However, as the *Signal-Stat* decision illustrates, this result, depending upon the limited nature of the contractual language, has no application to a contract, such as presented in the instant case, which provides a grievance and arbitration procedure for disputes or differences arising between the "company and the union" (much broader terminology than the "company and any employee"), and which further anticipates grievances on broad questions by providing that "either party" may submit an unsettled matter to arbitration (as contrasted with the *Markel* language permitting only "the party filing the grievance" to submit the same to arbitration). The Court in *Markel* quite properly decided that the very limited grievance and arbitration procedure therein was intended to cover specific and limited disputes of the nature that normally arose in the day to day operation of a collective bargaining contract, and which involved only a few employees. In view of the express limitation of the language of the contract relative to such grievances, it was quite consistent that only the party filing the grievance would be permitted to submit the same to arbitration.

The arbitration clause in the instant case is assimilable to that in *Signal-Stat* and is distinguishable from that in *Markel* for the same reasons the Second Circuit distinguished *Signal-Stat* from *Markel*. The fact that the contract in *Signal Stat* provides for "the difference, dispute or grievance" to be submitted by either party to arbitration is not a significant difference from the contract in the instant case providing simply that the "grievance" may be so submitted by either party. The contract in *Signal-Stat* uses the term "grievance" as the equavalent of "difference, dispute or grievance", in the sentence providing for submission to arbitration. That sentence reads:

> "If no satisfactory settlement is arrived at, within 10 days of the date of the filing said grievance, then the difference, dispute or grievance shall at the request of either party, be immediately submitted for arbitration."

As we have earlier contended, we believe that Section 6 of Article III of the contract herein was intended to equate the word "grievance" in the phrase "in the event any grievance relating to the meaning or application of this agreement is not satisfactorily disposed of in the foregoing steps of the grievance procedure, either party may submit the unsettled grievance to an impartial arbitrator * * *" with the phrase in Section 1 which provides generally for the settlement of "differences * * * between the company and the union as to the meaning and application of this agreement". Sections 2, 3 and 4 of Article III are obviously appropriate (and conventional) procedures for processing grievances of individual employees and it is equally obvious that they are inappropriate for processing disputes between the union and the company "as to the meaning and application" of the contract. Such disputes lend themselves to the procedures prescribed by Sections 5

and 6. Accordingly, a construction of the entire article which denies the equivalence of "grievance" in Section 6 with the "differences" referred to in Section 1 would relegate basic disputes between the union and the company as to the meaning of the contract to a wholly inappropriate procedure and would be non-arbitrable. On such a construction only individual employee grievances would be arbitrable under Section 6. As will be developed at a later point the contract is pregnant with many possibilities of dispute not arising out of individual employee grievances. Section 1 recognizes this fact. But a construction of the entire article which imputes to the parties an intent as to the porcedures for the resolution of such disputes so unrealistic and at such variance with common practice in industrial relations would do violence to elementary principles of construction.

Admittedly, Article III is not a model of precision. It is inartistically drawn and merges at least two, if not three subjects which might better have been treated separately, viz. (1) the disposition of individual employee grievances (2) the resolution of basic disputes over the contract between the union and the company (3) arbitration. But its deficiencies are not such as to render it nugatory and a construction which gives a reasonable effect to each of its terms and to the Article in its entirety in harmony with the stated purposes of the parties in contracting (See Preamble, App. 8a) should commend itself to the Court.

It is submitted that the entire article is harmonized internally and with the purposes of the parties if it be regarded as contemplating (1) that individual employee grievances be processed as provided in Sections 2 through 6, (2) that basic "differences" between the contracting parties be the subject of direct negotiation between author-

ized spokesmen for the principals (union and company) in the first instance, and (3) that both types of controversy ("grievances" in Section 6 being construed as comprehending the "differences" referred to in Section 1 as well as the "grievance" introduced in Section 2) are subject to arbitration as provided in Section 6.

The Markel decision is completely consistent with this view in that while specifically limiting recourse to arbitration to the party filing the grievance, the contractual language in *Markel* also specifically limited the application of the grievance procedure to those matters arising between "the company and any employee" rather than the much broader area of disputes arising between "the company and the union" or "the parties".

Appellants' position herein is not in any way inconsistent with this Court's decision in *Hoover Motor Express v. Teamsters Union Local 327, supra.* This Court, in that decision, raised the implication that the word "grievance" had taken on a certain general connotation, becoming at least in part, a word of art in the labor-management relations field. At most, however, this Court there may have intended to indicate that "grievance" would be given this meaning in the absence of any *other* guide to the meaning of the term as used in a contract between two parties. This view of *Hoover* is confirmed by this Court's subsequent decision in *NLRB v. Associated Machines, Inc.*, 219 F. 2d 433, (6 C.A. 1955). In that case this Court, in interpreting the word "grievance" [as used in Section 2(b) of the National Labor Relations Act, as amended, 29 USCA 152 (5)], gives it a very broad meaning. We believe the language of the contract herein provides ample evidence of the intention of the parties to the contract to use the word "grievance" as the equivalent of any "difference" that

might arise "between the company and the union as to the meaning and application of the agreement", a term we contend, broad enough to include the issues raised by appellee's complaint.[8]

As the 2nd Circuit's decision in *Signal-Stat* indicates, several cases involving the question of the issuance of a stay pending arbitration in causes of action based upon breaches of no-strike provisions of collective bargaining contracts have reached a result contrary to that reached in *Signal-Stat*. Several of these cases admit of an analysis similar to *Markel Products v. United Electrical Workers, supra*, in that they are based on an interpretation of the *specific language* of the collective bargaining contract in question which, in those cases, is much more limited in its application than the language of the contract herein. Also, as Judge Frank indicates, some cases reaching contrary results on contractual language not easily distinguishable from language of the type involved in both *Signal-Stat* and the instant case are, in the view of the Second Circuit, "erroneous".

We believe the case of *Colonial Hardwood Flooring Company v. United Workers*, 168 F. 2d 33 (4 C. A. 1938), one of the cases most frequently cited in this area of litigation, is illustrative of both points. (It should be noted again that this case is one of those cited by the Second Circuit for the statment that "to the extent that the cases

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[8] We believe our position on this point is strengthened by *Elgin J. and E. Ry. Co. v. Burley*, 325 U. S. 711, 65 Supreme Court 1276 (1945) cited by this Court in the Hoover decision, where the Court, in discussing the type of disputes which involve "grievance" states:

> "The second class, however, contemplates the existence of a collective agreement already concluded. * * * The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case."

cited by plaintiff require a contrary result we think them erroneous".) The *Colonial* case held, among other things, that a suit for a breach of a no-strike clause in a collective bargaining contract would not involve "any issues referable to arbitration" under the arbitration language of the particular contract. It is somewhat typical of many cases involving the question under consideration that the *Colonial* decision did not set forth the specific language of the arbitration clause upon which the decision on this point would necessarily have been based. In *Lewittes and Sons v. Furniture Workers, supra*, the Court, in discussing the *Colonial* case, clearly establishes the irrelevancy of that decision to cases involving language such as we have in the case at bar. The court points out that the contractual language in the *Colonial* case *specifically limited* the grievance and arbitration provisions to disputes involving "hours and other conditions of employment".

More important is the fact that the Colonial case initiated a general approach to the question of stays pending arbitration under collective bargaining contracts, since followed by other courts. Apart from consideration of the specific language of the contract involved, the Fourth Court of Appeals in Colonial held that arbitration clauses generally were not intended to cover actions involving breach of a no-strike clause, but, on the contrary, were intended to prevent such strikes. In view of the specific contract language under consideration in *Colonial*, these general comments were, at least in part, gratuitous. However, the Fourth Circuit's general approach to this problem has been considered by so many courts as to now have weight apart from the language of the particular contract upon which the case was based. We believe it was this general reasoning and attitude which Judge Frank condemned as "erroneous" and a restoration "by indirection * * * [of]

the same result as the old, and now generally rejected, judicial aversion to enforcing arbitration agreements".

It was this general attitude of the Fourth Circuit which was practically paraphrased, and then answered, by the District Court in *Pennsylvania Greyhound Lines v. Amalgamated Association of Motor Coach Employees*, 98 F. Supp. 789, 791. The Court there stated:

> "The plaintiff further contends that the matter involved in this action is not referable to arbitration for the reason that the grievance and arbitration procedure in the contract was intended to prevent strikes and lockouts and was not intended to be resorted to after a strike had occurred. The provisions of the contract in this respect are very broad. Section 2 of Article 1 of the contract includes 'all differences, disputes and grievances, other than discipline and discharge cases, hereinafter provided for, between the parties arising out or by virtue of the within collective labor agreement.' We believe this language is clear and unambiguous and does not admit of any explanation or limitation by parole evidence or otherwise. *Gianni v. R. Russel & Co.*, 1924, 281 Pa. 320, 128 A. 791. On the contrary, it seems clear to us that if the employer has occasion to resort to the grievance and arbitration machinery, it would very likely be in connection with a strike. We, therefore, hold that the case raises an 'issue referable to arbitration under an agreement in writing for such arbitration' within the terms of Section 3 of the United States Arbitration Act (at page 791)."

The Third Circuit reversed this decision on other grounds. But the Second Circuit in *Signal-Stat*, refers to it as one of those cases "with which we agree", and which "support our decision that this instant arbitration agreement covers a dispute arising from an alleged breach of the no-strike

clause". We may conclude that the Second Circuit approvingly adopts the "modern" approach to labor arbitration displayed by the District Court in *Pennsylvania Greyhound*.

Appellee, in earlier stages of this litigation, has advanced a number of arguments which, in effect, boil down to the proposition that the arbitration provision of the instant contract could not possibly apply to the issues involved in a suit for breach of the no-strike provision because the arbitration provision can only be applied to a grievance (or "differences * * * as to the meaning or application of this agreement") which has been processed through all steps of the grievance procedure preceding the final step which is arbitration. Since we anticipate appellee will advance this argument before this Court, we shall specifically consider it here. Such a proposition fails to take account of all of the language of the first six sections of Article III of the contract. It completely ignores, for example, the shift from the phrase "the grievance" utilized in the early stages of the grievance procedure (Sections 2-4 of Article III) to "any grievance" which appears in Section 5, the last stage of the grievance procedure prior to arbitration. The particular significance of this use of the term "any grievance" in Section 5 is highlighted by Section 2 of Article VI (Appendix 12a) which specifically provides for the immediate submission to a committee, analagous to that provided by Section 5 of the grievance procedure, (omitting anything analagous to the earlier stages of Sections 2-4) of any dispute involving the discharge, suspension or disciplinary layoff of any employee. Section 2 of Article VI does not, however, mention the grievance procedure, use the term "grievance", or, itself, specifically provide for submission of such a con-

troversy to arbitration. Yet, it could not be contended that such a dispute or difference between the parties involving, for example, the discharge of an employee would *not* be subject to arbitration under Art. III. But appellee's logic that only matters subject to *all* steps of the grievance procedure are arbitrable would compel such an absurd conclusion.

In fact, in the face of a grievance procedure which is intended to encompass all differences between the company and the union as to the meaning and application of the agreement, appellee's (expected) position is completely lacking in force. Any number of situations which might normally be assumed to be within the scope of the grievance procedure would necessarily be removed by this strained and limited construction. By way of example, Article II, Section 3 of the contract, (App. 13a) specifically permits an International representative to attend meetings between the plant bargaining committee and the company. If the employer refused to admit an International representative to such a meeting, would the union be compelled to acquiesce simply because it would not be possible for its complaint to be submitted pursuant to Section 2 of the grievance procedure which provides that "any employee having a grievance shall first submit the same to the steward of his department or to his foreman". If such a situation arose, and if the company's theory were followed through, would the company then concede that since its action in barring the International representative was not governed by the grievance and arbitration procedure, the union would be free to strike over such a minor dispute?[9]

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[9] In *N. L. R. B. v. Wagner Iron Works, et al.*, 220 F. 2d 126, 140 (C. A. 7, 1955); cert. denied 76 S. Ct. 466, 1956, the Seventh Circuit notes that a no-strike clause in a contract will normally not preclude a strike over a matter which is not within the scope of the arbitration provision of the same contract, a principle which would be particularly true here where the no-strike clause is, itself, merely a phrase in Section 1 of Article III of the contract, i. e. a part of the grievance procedure itself.

The same anomaly would result from a number of other situations involving small scale or day-to-day differences. Such situations include, for example, "differences * * * as to the meaning or application" of Sections 1 and 2 of Article II providing for representation of the union (through various committees, etc.) in administration of the contract, or differences arising under the union shop and check-off provisions of Article I (App. 8a-9a).

Such a limited construction of the grievance procedure would, in effect, render it inapplicable to a large variety of situations including, among others, substantially all instances where the *company* might wish to exercise the right of "either party" to submit a dispute to arbitration. As the District Court in *Pennsylvania Greyhound Lines v. Amalgamated Association of Motor Coach Employees, supra,* notes:

> "* * * On the contrary, it seems clear to us that if the employer had occasion to resort to the grievance and arbitration machinery it would very likely be in connection with a strike. * * *"

In a very recent decision of the New York Supreme Court, the Court, considering a position analogous to appellee's anticipated position here, in a case involving a request by a party for an order compelling arbitration, states:

> "Objection is made to the award in that the complete machinery of adjustment was not exhausted prior to demanding arbitration. The occasion of the dispute was whether respondent was, in fact, removing its plant from New York City to Oklahoma. The omission complained of was that this question was not first taken up on the shop steward level. Obviously, this objection lacks substance. Upon the question here involved, discussion on the level suggested would be less than a formality. The contract

must be read with that in mind and the obvious construction is that it does not require what would be useless." *In re Pocketbook Workers Union*, 149 N. Y. Supp. 256 (February 6, 1956).

In the case of *Wilson Bros. v. Textile Workers Union*, 132 F. Supp. 163 (D. C. N. Y. 1954) the contract language made the same contention as here anticipated much more plausible. The court, nevertheless, rejected it and ruled that this issue was one involving the arbitrator's jurisdiction and the meaning of the arbitration clause, and was, thus, a question of arbitrability which should properly be left, in the first instance, for decision by the arbitrator. This decision is consistent with, and in support of, our principal position set forth in the previous section of this brief to the effect that the issue of arbitrability of the alleged breach of contract should, itself, be left to the arbitrator for initial decision since it involves the issue of meaning and application of the contract, i.e., Article III thereof. In the *Wilson* case, the court states:

> "The parties made detailed contractual provisions for vacation pay in Section XVI of their contract. In Section V(A) they explicitly provided that '(a)ny difference, grievance, or dispute between the Company and the Union or any employee arising out of or relating to this agreement or its interpretation or enforcement shall be subject to' the grievance and arbitration procedure thereafter stated. * * *
>
> "Similarly, for the parties' dispute as to what was the applicable arbitration procedure. Whether under the circumstances here enumerated, e. g. the closing of the plant, termination of the agreement, the union could invoke Section V (F) of the contract and in the first instance enable its officers to deal directly with the officers of the employer, thereafter submitting the dispute to the American Arbitration

> Association, and thus by-pass a non-existent grievance machinery and fail to attempt to agree to an arbitrator pursuant to Section V (A) (Step 4) of the contract; or whether there was a mutual waiver of these provisions, are matters of contract interpretation which by the terms of the contract are rightly arbitrable issues, and not, at least at this stage of the dispute, for the courts."

In conclusion on this point, appellants contend that the language of the contract itself, as a matter of law, clearly contemplates that the issues involved in appellee's complaint are subject to arbitration as "differences * * * between the company and the union as to the meaning and application of this agreement".[10] Any other decision would necessarily disregard important parts of the grievance procedure, and, particularly, the language in Section 6 giving "either party" the right to submit a grievance (or difference as to the meaning and application of the agreement) to the arbitrator. General rules of contract construction, as in the case of statutory construction, dictate the advisability of presuming that the parties, inserting language in a contract, did not perform a useless act. The specific language permitting either party to submit a matter to arbitration cannot be disregarded in the face of the sharply drawn contrast, previously discussed, between *Signal-Stat Corporation v. U. E.*, 38 L. R. R. M. 2378 (2 C. A. July 2, 1956) and *Markel Electric Products v. United Electrical Workers*, 202 F. 2d 435 (C. A. 2 1953) (the former permitting *either* party to so submit and the latter permitting only

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[10] In fact, we contend that they are also submissible to the last stage of the grievance procedure set forth in Section 5 of Article III (which provides for submission to a group composed of "the shop committee and management"). However, in view of the prolonged nature of the instant dispute, appellants would be willing to agree with appellee that submission at Section 5 would be rather futile at this stage and it would be better to proceed directly to arbitration.

the party filing to submit). If the contract herein provided, as did that involved in the *Markel* decision, only that the party filing the grievance might submit the same to arbitration, it might well be that appellee's anticipated position would be well taken (though even in *Markel,* there was a very strongly worded dissent by Judge Clark). *The main point is that the contractual language herein on the vital points is closely akin to the language involved in Signal-Stat and not to that involved in Markel.*

Appellants contend that this Court, in accord with the Second Circuit, should, give due regard to the present day broad view of arbitration, reverse the District Court and approve the issuance of a stay in the proceedings herein. We respectfully suggest for the Court's consideration the language of a recent New Jersey Superior Court decision discussing, generally, the merits of a liberal construction of arbitration provisions in contracts. The case incidentally, involved a suit by a union to compel an employer to proceed to arbitration in accordance with the provisions of a collective bargaining agreement. In that case, *Standard Oil Union v. Esso Corporation,* 118 A. 2 70 (N. J. Superior Court, Appellate Division, 1955), the Court states, in part:

> "The function of the courts is to determine whether there is a bona fide dispute as to meaning: The purpose of interpretation is to discover meaning. If the significance of the language is clear, then the allegation of a contrary meaning is frivolous and without legal consequence. On the other hand, if the language employed is reasonably susceptible of more than one import or if certain sections of the agreement may be said reasonably to be ambiguous when considered in relation to each other, or if it is fairly arguable that clauses apparently

pertaining to the same subject matter are in conflict, then the dispute must be referred to arbitration.

"A further word of caution and explanation should be said as to the nature of the judicial intervention. The reluctance of the courts to sanction the arbitration process is a relic of the past. Now it is recognized as an integral part of our economic life and welcomed as a practical and expeditious means of disposition of industrial disputes. Consequently, when an agreement has been made between management and labor for the regulation of wages, hours and conditions of employment, and as an incident thereof they have stipulated to resort to arbitration in the event of dispute as to the interpretation of language employed therein, the judiciary will study the nature of the dispute with the utmost liberality and freely exercise the power authorized by the Legislature (*N. J. S. 2 A:24-3, N. J. S. A. supra*) to compel arbitration in order to effectuate the practical purpose of the signatories.

"It is not our intention to express the view that before the parties will be ordered to the forum of arbitration, the judicial mind must find merit in an asserted interpretation. The test being expounded is that arbitration will be directed when it appears to the mind of the ordinary layman that the particular language involved is reasonably open to the connotation contended for. If the contention proposed is such that no ordinary layman, acting in good faith, would seriously advance it, then our statutory power will not be exercised."

On the specific issue before it, the Superior Court affirmed the lower court decision ordering the employer to proceed to arbitration.

Judicial attitude toward arbitration is, we believe, an important element in the decision of this case. We respectfully urge that this Court reject the outmoded ap-

proach of judicial hostility and adopt the modern view represented by the Second Circuit's decision in the *Signal-Stat* case. Recognition of the spirit and purpose, as well as the letter, of the Federal Arbitration Act weighs heavily in favor of such an approach, and, necessarily, in support of the result we seek.

The Congress, by enacting the Federal Arbitration Act, Title 9 U. S. C. A., gave evidence of its general approval of arbitration as a desirable manner for the adjustment of contract disputes. When that Act was originally passed in 1925, it completely reversed the adverse judicial climate with regard to arbitration agreements and placed those agreements on the same footing as other contracts. See Sturges and Murphy, *Some Confusing Problems Relating to Arbitration Under the United States Arbitration Act*, 17 Law and Contemporary Problems 580.

In view of Congressional recognition of the value and legality of arbitration agreements, and in view of the particular desirability and widespread use of such agreements in the area of labor management relations, arbitration would appear to be particularly appropriate in the circumstances in this case. The position of appellee amounts to a contention that this Court should revert to the original and thoroughly discredited judicial position on arbitration clauses insofar as collective bargaining agreements are concerned. It would be difficult to think of a position which would be more out of keeping with the legislative and judicial recognition given to arbitration clauses in recent years. This is particularly true in view of the Congressional policy in the area of labor management relations as expressed in the Labor Management Relations Act of 1947 which favors private adjustment of labor disputes. Denial of the instant motion to stay would tend to undermine and destroy the system of

orderly labor management relations developed by liberal use of arbitration clauses, and would, to a large extent, defeat the Congressional purpose in the area of labor management relations.

The atmosphere in which, we contend, the Court should decide this alternative issue of the stay pending arbitration, is succinctly set forth in the quotation from the famous English case of *Heyman v. Darwins* (1942) A. C. 356, contained in the Second Court of Appeals decision in *In Re Pahlberg's Petition,* 131 F. 2d 968, (C. A. 2, 1942) where it is stated:

> "An arbitrartion clause is a written submission, agreed to by the parties to the contract, and, like other written submissions to arbitration, must be construed according to its language and in the light of the circumstances in which it is made. If the dispute is whether the contract which contains the clause has ever been entered into at all, that issue cannot go to arbitration under the clause, for the party who denies that he has ever entered into the contract is thereby denying that he has ever joined in the submission. Similarly, if one party to the alleged contract is contending that it is void *ab initio* (because, for example, the making of such a contract is illegal), the arbitration clause cannot operate, for on this view the clause itself also is void. But, in a situation where the parties are at one in asserting that they entered into a binding contract, *but a difference has arisen between them whether there has been a breach by one side or the other, or whether the circumstances which have discharged one or both parties from further performance,* such differences should be regarded as differences which have arisen 'in respect of,' or 'with regard to,' or 'under' the contract, and an arbitration clause which uses these, or similar expressions should be construed accordingly." (Emphasis supplied.)

RELIEF

Therefore, it is respectfully submitted that this Honorable Court reverse the holding of the Court below insofar as that Court refused to order a stay of proceedings pending arbitration, and, pursuant to Section 3 of the United States Arbitration Act, Title 9 U. S. C., remand this action to the District Court with direction to enter an order staying all further proceedings until the question of the arbitrability of the issues raised by the complaint herein has been submitted to an arbitrator and until such issues have been arbitrated, in the event the arbitrator rules they are arbitrable; or, in the alternative an order adjudicating the arbitrability, as a matter of law, of the issues raised by the complaint herein, and staying all further proceedings until those issues have been submitted to, and determined by, an arbitrator pursuant to the provisions of the collective bargaining contract pleaded herein as part of the complaint.

Respectfully submitted,

REDMOND H. ROCHE, JR.,
Attorney for Appellants,
8000 E. Jefferson,
Detroit 14, Michigan.

HAROLD A. CRANEFIELD,
Of Counsel,
8000 E. Jefferson,
Detroit 14, Michigan.

APPENDIX

RELEVANT DOCKET ENTRIES

1952	
June 24.	Complaint filed.
July 18.	Appearance by defendants filed.
1953	
May 2.	Filed motion for leave to file amended and supplemental complaint.
May 13.	Filed stipulation for plaintiff to file amended and supplemental complaint.
May 13.	Filed order granting leave to file amended complaint.
May 13.	Amended and supplemental complaint for damages filed.
June 3.	Filed motion of defendants to dismiss the action or in the alternative to stay proceedings, affidavit in support of motion and proof of service.
1954	
Dec. 2.	Hearing on defendants' motion to dismiss.
1955	
Jan. 3.	Filed motion to amend defendants' pending motion to dismiss.
1956	
May 31.	Filed opinion of court in re motions.
May 31.	Orders entered denying motion to dismiss; denying motion to stay proceedings; granting motion to vacate the notice of taking of deposition of the International Union and the local union; denying motion to quash subpoenas. Attorneys notified of entry of said orders.

June 7. Filed defendants' motion to continue time in which defendants may answer complaint.

June 7. Filed affidavit of service of motion to continue time in which defendants may answer plaintiff's complaint.

June 14. Filed notice of appeal and bond on appeal.

June 15. Mailed copies of notice of appeal to Elden W. Butzbaugh and Vedder, Price, Kaufman & Kammholz, attorneys for plaintiff.

June 15. Mailed record on appeal to U. S. Circuit Court of Appeals.

AMENDED AND SUPPLEMENTAL COMPLAINT

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

Benton Harbor Malleable Industries, a corporation, Plaintiff, vs. International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO), a labor organization, and Benton Harbor Malleable Local No. 880 of International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO), a labor organization, Defendants.	Civil Action No. 2077.

AMENDED AND SUPPLEMENTAL COMPLAINT FOR DAMAGES

Comes now Benton Harbor Malleable Industries, a corporation, plaintiff in the above entitled cause, and complains of International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-

CIO), a labor organization, and Benton Harbor Malleable Local No. 880 of International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO), a labor organization, defendants herein, and each of them and alleges:

1. This is a suit for violation of a contract between an employer and a labor organization representing employees in an industry affecting commerce within the meaning of Section 301 (a) of the Labor Managament Relations Act, 1947, as amended, hereinafter referred to as "The Act". The jurisdiction of this Court is based upon said Section 301 of "The Act".

2. Plaintiff is a corporation duly organized and existing under the laws of the State of Michigan and having its principal offices in Benton Harbor, Michigan.

3. Plaintiff is an employer engaged in the operation of malleable, grey iron and die casting foundries in the Western District of Michigan, Southern Division, and in the course and conduct of its business uses materials and items delivered and transported in interstate commerce from and through various states of the United States, and ships and delivers its finished products in interstate commerce to and through various states of the United States other than the State of Michigan and plaintiff has been at all times referred to herein and is now engaged in an industry affecting commerce as defined in "The Act".

4. In the course and conduct of its business as aforesaid plaintiff operates, in the Western District of Michigan, Southern Division, four plants known as Plant Nos. 1, 2, 3 and 5, Plant No. 1 is a malleable foundry, Plant No. 2 a machine processing division, Plant No. 3 a die casting division and Plant No. 5 a grey iron foundry.

5. Defendant, International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO), is an unincorporated association and is a labor organization which represents employees of plaintiff in an industry affecting commerce as defined in "The Act" in the Western District of Michigan, Southern Division.

6. Defendant, Benton Harbor Malleable Local No. 880 of International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO), is an unincorporated association and is a labor organization which represents employees of plaintiff in an industry affecting commerce as defined in "The Act" in the Western District of Michigan, Southern Division.

7. Duly authorized officers or agents of defendants, and each of them at all times hereinafter mentioned, have been and are now engaged in representing or acting for employee members in the Western District of Michigan, Southern Division.

8. On, to-wit, February 26, 1952, plaintiff, as an employer, and defendants, as labor organizations representing employees in an industry conducted by plaintiff in the Western District of Michigan, Southern Division, affecting commerce as defined in "The Act", made and entered into a certain contract and agreement in writing covering wages, hours of work, conditions of employment, the method of adjusting alleged grievances and other matters with respect to the aforesaid employees. A copy of said agreement is attached hereto as Exhibit "A" and made a part hereof. Said agreement has, since the date thereof, and is now in full force and effect and will, unless terminated in accordance with the terms and conditions thereof, remain in full force and effect until February 26, 1955, and from year to year thereafter.

9. Said agreement between plaintiff and defendants on behalf of their officers, agents and members was executed for the benefit of defendants and their members and the benefits thereof were accepted by them and each of them.

10. Plaintiff has at all times fully performed and complied with the terms and conditions of said agreement.

11. The aforesaid agreement expressly provides in Article III, Paragraph 1, thereof as follows:

> "1. Shall difference arise between the Company and the Union as to the meaning and application of this Agreement, or should any local trouble arise, an earnest effort shall be made to settle such differences, and it is agreed by the Union that there shall be no strike,

slowdown or stoppage of work on the part of the Union or its members and there shall be no lockout on the part of the Company during the term of this contract. The parties shall in all instances resort to the following steps of the grievance procedure."

12. Notwithstanding the aforesaid agreement and in violation thereof and without exhausting the procedure provided in the aforesaid agreement for the settlement of grievances, the following acts and things have been committed and done:

a. On, to wit, June 18, 1952, at 1:30 o'clock P. M. there occurred a strike and stoppage of work by employees represented by defendants at plaintiff's aforesaid plant No. 1. All of the employees of said plant discontinued work at said time and date, except employees working in and around the furnaces of said plant, which employees ran out the iron in said plant and thereupon likewise discontinued work. Since the time of discontinuance of work in said plant on June 18, 1952, all of the employees of said plant represented by defendants have participated in the aforesaid strike and stoppage of work and continued so to do until June 25, 1952.

b. On, to wit, June 18, 1952, there occurred a strike and stoppage of work at plaintiff's aforesaid Plant No. 2. All of the employees of said plant represented by defendants discontinued work on said date, except employees of the tool and die division of said plant. Said employees of the tool and die division of said plant continued working on June 18, 1952, and thereafter discontinued work. Since said discontinuance of work, all of the employees of plaintiff's Plant No. 2 represented by defendants have participated in the aforesaid strike and stoppage of work and continued so to do until June 25, 1952.

c. On, to wit, June 19, 1952, there occurred a strike and stoppage of work by employees of plaintiff represented by defendants at plaintiff's Plants Nos. 3 and 5. All of the employees of plaintiff represented by defend-

ants participated in said strike and stoppage of work and continued so to do until June 25, 1952.

d. On, to wit, March 20, 1952, there occurred a strike and stoppage of work by employees represented by defendants at all of plaintiff's Plants Nos. 1, 2, 3 and 5 aforesaid. All of the employees of plaintiff represented by defendants participated in said strike and stoppage of work, which continued for two days, to wit, March 20 and 21, 1952, which said stoppage of work completely shut down plaintiff's said four plants during said two days.

e. On, to wit, April 27, 1953, at midnight, there occurred a strike and stoppage of work by employees represented by defendants at all of plaintiff's Plants Nos. 1, 2, 3 and 5 aforesaid. Substantially all of the employees of plaintiff represented by defendants participated in said strike and stoppage of work and continue so to do. As a result of said strike and stoppage of work the plaintiff's operations and production have been completely stopped.

13. Defendants and the officers, agents and representatives of defendants have caused, authorized, instigated, aided and condoned the aforesaid strikes and stoppages of work.

14. All of said strikes and stoppages of work and the said acts of the defendants and the officers, agents and representatives of defendants were and are in violation of the aforesaid agreement and the defendants and their offices, agents, representatives and members have breached said agreement.

15. The business and activities of plaintiff involved in the aforesaid strikes and stoppages of work are business and activities which affect commerce as defined in "The Act" and the employees who have engaged and are now engaging in any of the aforesaid strikes and stoppages of work are employees in an industry affecting commerce as defined by said "Act".

16. The aforesaid strike and stoppage of work which occurred on April 27, 1953, and which continues, has rendered plaintiff unable to fill orders of its customers; has caused plaintiff to lose valuable orders and contracts from which plaintiff would have made substantial profits, has destroyed the confidence of plaintiff's customers in plaintiff's ability to produce and deliver merchandise, and has virtually destroyed plaintiff's business. Unless said unlawful strike in violation of said agreement terminates immediately, it is probable that said strike has already or will cause the complete destruction of plaintiff, as a business enterprise and that plaintiff will, as a result, have its business and operations terminated completely and permanently, for all of which plaintiff claims damages. As a result of all the aforesaid acts and the aforesaid violations of said agreement, plaintiff has sustained and in the future will sustain injury and damage including the loss of the value of products and items of commerce which otherwise would have been or would be produced at the aforesaid plants, the loss of profits reasonably to be anticipated by plaintiff upon the sale of such products, damage to materials and equipment in said plants and the loss of good will as a result of the inability of plaintiff to furnish products of said plants to its customers to the damage of plaintiff in the sum of Six Million Dollars ($6,000,000).

Wherefore, plaintiff prays judgment against defendants for the sum of Six Million Dollars ($6,000,000) and for its cost herein incurred.

Plaintiff demands a trial by jury.

Benton Harbor Malleable Industries,

By Elden W. Butzbaugh,
Attorney for Plaintiff Herein.

Elden Butzbaugh,
172 East Main Street,
Benton Harbor, Michigan,
Attorney for Plaintiff.

Vedder, Price, Kaufman & Kammholz,
105 South LaSalle Street,
Chicago 3, Illinois,
Of Counsel:

PORTIONS OF EXHIBIT A TO AMENDED AND SUPPLEMENTAL COMPLAINT

(Collective Bargaining Agreement of February 26, 1952)

AGREEMENT

This Agreement made and entered into this 26th day of February, 1952, between Benton Harbor Malleable Industries of Benton Harbor, Michigan (hereinafter referred to as the "Company"), and the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO), Benton Harbor Malleable Local No. 880, Benton Harbor, Michigan (hereinafter referred to as the "Union").

Witnesseth, That

Whereas, it is the general purpose of the Agreement to promote and improve the industrial and economic relationship between the Company and its employees and set forth the basic agreement covering rates of pay, hours of work and conditions of employment to be observed by the parties hereto, which shall apply to all employees covered by this agreement without discrimination on account of race, color, national origin or creed.

Article I

1. The Company agrees to recognize the Union as the exclusive collective bargaining agency for all hourly paid or rated employees of the Company, except the supervisory employees designated by the Company, time-study men, office and plant control employees. The Company agrees to furnish the Union with a list of superintendents, foremen, and other supervisory employees and to notify the Union of any changes by posting notices thereof on the bulletin board in the department wherein such change occurred.

2. By virtue of Union compliances with the requirements of Section 8 (a) (3) of the Labor Management Relations

Act of 1947, as amended, it is agreed that: All employees covered by this Agreement shall, as a condition of employment, become members of the Union in good standing, thirty days following the beginning of such employment, or the effective date of this Agreement, whichever is the later and shall continue to remain members in good standing during the term of this Agreement. For the purpose of this Agreement "good standing" shall be that defined in the Constitution and By-Laws of the Union, subject to any applicable provisions of the Law.

3. The Company will deduct from the wages of the employees and turn over to the Financial Secretary of the Union the initiation fees, Union dues, and assessments of such members of the Union as individually and voluntarily certify in writing that they authorize such deductions. Such authorizations shall apply for the duration of this contract. Such deductions will be made from the first pay check due to such employees each month and the funds so deducted will be remitted by the Company on or before the 15th day of that month.

Article II

Representation

1. For the purpose of collective bargaining the Union will be represented by a Shop Committee of nine (9) members, all of whom shall be employed by the Company.

2. The Company agrees to recognize duly designated members of the Union as stewards, not to exceed 25 in number. In the event shifts are added, a reasonable number of additional stewards may be designated. The Union agrees to keep the Company advised of any changes in its steward lists.

3. The Local 880 Bargaining Committee shall have the right to have an International representative and recording secretary present at any meeting.

4. Members of the Shop Committee, not to exceed two at a time, may enter the shop at any time to investigate

grievances that are pending provided they have applied for a proper pass. It is agreed that this privilege will not be abused by the Union nor will management deny such privilege when proper reason is given.

Article III

Grievance Procedure

1. Shall difference arise between the Company and the Union as to the meaning and application of this Agreement, or should any local trouble arise, an earnest effort shall be made to settle such differences, and it is agreed by the Union that there shall be no strike, slowdown or stoppage of work on the part of the Union or its members and there shall be no lockout on the part of the Company during the term of this contract. The parties shall in all instances resort to the following steps of the grievance procedure.

2. Any employe having a grievance shall first submit the same to the steward of his department or to his foreman. In the event the grievance is submitted to the department steward he shall negotiate the grievance with the foreman of the department.

3. If a satisfactory agreement cannot be reached promptly by the foreman and the steward the grievance shall be reduced to writing and referred to the committeeman of the division involved and the divisional superintendent or the designated representative of management as the case may be.

4. If the unsettled grievance pertains to a disputed rate and the Superitendent and Committeeman are unable to arbitrarily satisfy the grievance a joint time study will be taken immediately (within the next eight (8) working hours of the shift whereon the grievance arose). If the joint time study fails to satisfy the grievance, the matter shall be referred to the Shop Committee and Management wherein disposition is outlined in Section 5 of this Article.

5. If any grievance cannot be settled between the divisional superintendent or designated representative of Man-

agement and the Committeeman, within two working days, it shall be referred to the Shop Committee and Management for disposition.

6. In the event any grievance relating to the meaning or application of this Agreement is not satisfactorily disposed of in the foregoing steps of the grievance procedure, either party may submit the unsettled grievance to an impartial arbitrator agreed upon by them, provided notice is given to the opposite party within fifteen (15) days after the Shop Committee-Management meeting (above referred to) of intention to arbitrate. The parties shall bear equally the expenses of arbitration. The Arbitrator shall have no power to add to, ignore or modify any terms of this Agreement. His decision shall be final and binding upon both parties to this Agreement.

7. The Shop Committee, and Management or its representatives will meet on the first and third Wednesdays of each month for the purpose of settling grievances, the meetings to commence at 9:00 A. M. Any grievances presented at any meeting which cannot be settled at that meeting, shall receive a final answer by either the Shop Committee or Management at the following grievance meeting.

8. In the event of an emergency, a special meeting between the Shop Committee and Management may be called. A special meeting can be held only upon agreement between the Shop Committee and Management when the same is necessary.

9. Each representative of the Union, officially designated and recognized by this Agreement, who loses time during his working hours in handling grievances in the manner provided in this Agreement shall receive pay for such lost time on the following basis: If he is a piece worker, on the basis of his average straight time piecework earnings for the week, and if he is a day worker, on the basis of his day-work rate for the week. Time lost for handling grievances shall be allowed only if the Union representative presents a Grievance Time Slip signed by the foreman or the supervisor of that department in which the Union representative works and by the foreman or super-

visor of the department in which the grievance has occurred, this slip to indicate accurately the period of time lost. The Union representative engaged in processing a grievance shall notify the foreman or supervisor of that particular department of the nature of the grievance. In the event a foreman or supervisor refuses to sign a Grievance Time Slip, he shall state in writing on the slip, his reason for refusing to sign. It is the intention of the parties to keep grievance time at a minimum and all unnecessary grievance time, including "doubling" of Union representatives on grievance investigation or processing shall be avoided.

10. Any written grievance presented under this Article affecting the earnings of an employee shall be retroactive to the date of the filing of this grievance, and the effective date will be certified mutually by the Superintendent and Committeeman who participated.

Article VI

Discharges

1. Any employee discharged, suspended, or given a disciplinary lay-off while working, shall be given not to exceed fifteen minutes to confer with his steward or committeeman before leaving the shop.

2. Any employee discharged, suspended or given a disciplinary lay-off may appeal his case in writing within twenty-four (24) hours after such discharge, suspension or disciplinary lay-off. A meeting of the management, Shop Committee, and the employee will be held within the next forty-eight (48) hours after notification to the employment department, exclusive of Saturdays, Sundays, or holidays, unless the Company and the Union agree upon some other time. If it is found that the employee was wrongfully discharged or disciplined, the employee will receive his average rate of compensation during the week prior to the week in which the disciplinary action was taken; if the employee fails to appear at the hearing, his discharge, suspension or disciplinary lay-off will be considered absolute.

3. No employee borrowed or temporarily transferred from his regular department will be discharged during the time of such transfer, but will be returned to his regular department for final disposition or discipline action pending against him.

Article XI

Terminations

1. This contract shall continue in full force and effect until February 26, 1955 and from year to year thereafter upon the same terms and conditions herein set forth, unless at least sixty (60) days prior to the expiration of any contract period either party shall give to the other written notice of its desire to modify or amend or terminate this Agreement. Failing mutual agreement on such issue the parties may thereupon, notwithstanding any of the other provisions of this Agreement respectively resort to strike or lockout in support of their contentions.

2. This Agreement may be amended by mutual consent of the parties hereto prior to its expiration date.

3. Any notice to be given under this Article shall be given by registered mail, and if given by the Company shall be addressed to the Union at P. O. Box 83, Benton Harbor, Michigan, and if given by the Union shall be addressed to the Benton Harbor Malleable Industries, Benton Harbor, Michigan. Either party may by written notice change the address to which notices to it under this Article shall be sent.

SUPPLEMENT TO COLLECTIVE BARGAINING AGREEMENT OF FEBRUARY 26, 1952, DATED FEBRUARY 29, 1952

This Agreement made and entered into this 29th day of February, 1952, between Benton Harbor Malleable Industries of Benton Harbor, Michigan (hereinafter referred to as the "Company"), and the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO), Benton Harbor Malleable Local No. 880, Benton Harbor, Michigan (hereinafter referred to as the "Union").

Witnesseth, That

Whereas, In the negotiation of the 1952 Labor Management Contract between the Company and the Union it was agreed that the Union will be permitted to re-open the Labor Contract on February 27th, 1953 for the sole purpose of negotiating a Pension Plan or form thereof. The Company and the Union agree to terminate this re-opener within sixty (60) days from February 27th, 1953 by any one of the three following alternatives:

(1) Form some plan acceptable to the parties to the Contract.

(2) A postponement until February 27th, 1954 with these same privileges for the sole purpose of negotiating a form of Pension Plan, or

(3) The right to strike due to the Company's failure to negotiate a Pension Plan even though its financial position was improved over that of February 27th, 1952.

It is agreed that the Union will have this same elective right to re-open (solely for the same reason) during the same calendar period in the following years under the same conditions.

It is agreed that this supplemental Contract is not a commitment guaranteeing a Pension Plan, but rather a Contract authorizing the Union's rights in negotiating a plan and abridging those rights so that the Contract cannot be re-opened for any other reason than that which is stipulated.

International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO) Local No. 880

/s/ William Gaines
W. N. Gaines, President

/s/ Joseph Vega
Joseph Vega,
Int'l Representative

Benton Harbor Malleable Industries, Inc., for its Directors (By Official Appointment of its President, Mr. C. E. Schultz and its Vice President, Mr. O. C. Schultz)

/s/ C. E. Schultz
C. E. Schultz, President

MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO STAY WITH SUPPORTING AFFIDAVIT

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

Benton Harbor Malleable Industries, a corporation, Plaintiff, vs. International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO), a labor organization, and Benton Harbor Malleable Local No. 880 of International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO), a labor organization, Defendants.	Civil Action No. 2077.

MOTION OF DEFENDANTS TO DISMISS THE ACTION OR, IN THE ALTERNATIVE, TO STAY PROCEEDINGS

Defendants move this Court as follows:

1. To dismiss the action because the complaint as amended and supplemented fails to state a claim against the defendants or either of them upon which relief can be granted.

2. To dismiss the action on the ground that this Court is without jurisdiction over the subject matter of the action because Section 301 (a) of the Labor Management Relations Act, 1947, as amended, (29 U. S. C. A. Section 185) upon which plaintiff exclusively relies to establish the jurisdiction of this Court is unconstitutional in that it pur-

ports to extend the jurisdiction of this Court beyond the limitations prescribed by Article III of the Constitution of the United States.

In the alternative, and only in the event that this Court shall deny the above and foregoing motions, defendants move the Court, as follows:

3. To stay the proceedings in this action until arbirtation of the of the matters complained of by plaintiff shall have been had, on the ground that the complaint tenders only issues which are referable to arbitration under an agreement in writing between the plaintiff and the defendants and that no such arbitration has been had in accordance with the terms of the agreement nor has plaintiff sought such arbitration as more fully appears in the affidavit of James Morgan, attached hereto and made a part hereof and marked Exhibit "A". This motion is founded on The United States Arbitration Act, 43 Stat. 886; 9 U. S. C. A. Section 3.

Defendants respectfully request oral argument before this Honorable Court upon the issues raised by this pleading.

Harold A. Cranefield,
Attorney for Defendants,
8000 E. Jefferson,
Detroit 14, Michigan.

To: Elden Butzbaugh, Esquire,
Attorney for Plaintiff.

Please take notice that the undersigned will bring the above motion on for hearing before this Court at Room 228, Federal Building, in the City of Grand Rapids, Michigan on the nineteenth day of June, 1953 at ten o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Harold A. Cranefield,
Attorney for Defendants,
8000 E. Jefferson,
Detroit 14, Michigan.

EXHIBIT A

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

Benton Harbor Malleable Industries, a corporation; Plaintiff, vs. International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO), a labor organization, and Benton Harbor Malleable Local No. 880 of International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO), a labor organization, Defendants.	Civil Action No. 2077.

AFFIDAVIT IN SUPPORT OF MOTION TO STAY PROCEEDINGS

State of Michigan,
County of Wayne—ss.

James Morgan, being first duly sworn, on oath, deposes and says that:

1. He is employed by the above-named defendant International Union, United Automobile Aircraft and Agricultral Implement Workers of America, UAW-CIO, as Assistant Director of Region 1-B.

2. That Region 1-B is a geographical district established under the constitution of the said International Union for administrative purposes and that all transactions and relationships between the International Union and constituent local unions located within any such geo-

graphical district are conducted through the office of the Regional Director of such district who is ex-officio a member of the International Executive Board of the said International Union.

3. That the above-named defendant, Local No. 880, is situated within the said Region 1-B.

4. That by virtue of his employment as Assistant Regional Director of the said Region 1-B at all times mentioned in the complaint in this action, he is and has been, familiar with the contract or agreement between the plaintiff and the defendants in this action mentioned in the complaint and with all the transactions mentioned in said complaint and generally with the relationship between plaintiff and defendant labor organizations.

5. That the agreement mentioned and described in the complaint in this action provides in Article III, paragraph 6, thereof, as follows:

> "6. In the event any grievance relating to the meaning or application of this Agreement is not satisfactorily disposed of in the foregoing steps of the grievance procedure, either party may submit the unsettled grievance to an impartial arbitrator agreed upon by them, provided notice is given to the opposite party within fifteen (15) days after the Shop Committee-Management meeting (above referred to) of intention to arbitrate. The parties shall bear equally the expenses of arbitration. The Arbitrator shall have no power to add to, ignore or modify any terms of this Agreement. His decision shall be final and binding upon both parties of this Agreement."

6. That the plaintiff, Benton Harbor Malleable Industries, did not at any time prior to service of the summons and complaint in this action nor at any time since give a notice to the defendant International Union of intention to arbitrate a grievance based upon its contention as set forth in the complaint in this action that alleged strikes or stoppages of work on the occasions set forth

and described in Paragraph 12 of the complaint were in violation of the aforesaid contract or agreement.

7. Upon information and belief that the plaintiff, Benton Harbor Malleable Industries, did not at any time prior to the service of summons and complaint in this action nor at any time since, give notice to the defendant Local No. 880 of intention to arbitrate a grievance based upon its contention as set forth in the complaint in this action that alleged strikes or stoppages of work on the occasions set forth and described in Paragraph 12 of the complaint were in violation of the aforesaid contract or agreement.

James A. Morgan.

Subscribed and sworn to before me, this 2d day of June, 1953.

Louise Sarafian,
Notary Public, Wayne County, Michigan.
My commission expires: June 8, 1956.

OPINION OF THE DISTRICT COURT

UNITED STATES OF AMERICA

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

Benton Harbor Malleable Industries, a corporation, Plaintiff, vs. International Union, United Automobile, Aircraft and Agricultural Implement Workers of America et al., Defendants.	Civil Action No. 2077.

OPINION

Plaintiff employer has instituted this action for damages against the defendant union under §301(a) of the Labor Management Relation Act of 1947 (29 U. S. C. A. §185(2)).

The action was commenced by the plaintiff company seeking to recover damages against the defendant Union alleged to have been caused by a series of illegal strikes or work stoppages by the defendant Union and its membership.

Defendant has filed a motion to dismiss the action and in the alternative a motion to stay all proceedings until arbitration can be had under the terms of the collective bargaining agreement. Defendant has also filed a motion to vacate the notice of taking of depositions and to quash the subpoenas. The motion to dismiss has been substantially amended since the hearing on the original motion and alleges as a separate ground for dismissal of the action as to the International Union the theory that the International Union was not a party to the collective bargaining agreement. The motion to dismiss was originally based upon the grounds, first, that the complaint fails to state a claim upon which relief can be granted, and second, that the court is without jurisdiction to hear the complaint because §301(a) of the Labor Management Relations Act of 1947 is unconstitutional, in that it purports to extend the jurisdiction of the court beyond the limits of jurisdiction prescribed by Article III of the Constitution of the United States.

The Court has been unable to find any authority in the United States Supreme Court in regard to the constitutionality of §301. The matter has been before the Courts of Appeal and in each instance §301(a) has been found to be constitutional. Union Electrical R & M Workers v. Oliver Corp., 205 F. 2d 371 (8 Cir. 1953); Shirley-Herman Co. v. International Hod Carriers, 192 F 2d 806, (2 Cir. 1950); International Union United Furniture Workers of America v. Colonial Hardwood Flooring Co., 168 F. 2d 33, and see also Hamilton Foundry & M. Co. v. International M & F Workers, (6 Cir. 1951) 193 F. 2d 209, and International Union of Op-Eng. v. Daulen Const. Co., (6 Cir. 1951) 193 F. 2d 470.

Recently this matter has been before the United States Court of Appeals for the First Circuit in International

Brotherhood etc. v. W. L. Mead, Inc., 230 F. 2d 576. In that action the Court speaking through Chief Judge Magruder said at p. 579:

> "Of course, the basic constitutionality of the National Labor Relations Act, as an exercise of the commerce power, is beyond question. N. L. R. B. v. Jones & Laughlin Steel Corp. 1937, 301 U. S. 1, 57 S. Ct. 615, 81 L. Ed. 893; N. L. R. B. v. Fainblatt, 1939, 306 U. S. 601, 59 S. Ct. 668, 83 L. Ed. 1014."

The Court further said at p. 580:

> "It is well established that there is some power in Congress to confer upon the federal courts what has occasionally been called a 'protective jurisdiction', where resolution of the controversy which the federal courts must thereby determine requires the application of state law—either statutory or common law."

And at p. 581:

> "It may be a matter of dispute how far this power to prescribe a 'protective' federal jurisdiction extends. We shall not now attempt to probe its outer limits, for we are more than satisfied that the constitutional power is at least broad enough to cover the situation now before us. Here the jurisdiction conferred by §301(a) relates to a subject matter which Congress undoubtedly has power to regulate under Art. I of the Constitution (commerce clause). Not only that, but the Congress has actually exercised this regulatory power by the passage of comprehensive enactments, to wit, the National Labor Relations Act, as amended, and the other provisions of the Taft Hartley Act—which enactments do, in important respects, prescribe as a matter of federal law the rules to be applied in §301 cases. If Congress, instead of exercising its power to the full, has chosen (as well may be the fact, though it seems we do not need to decide the point in this case) to leave certain rules in §301 liti-

gation to be ascertained and applied in accordance with state law, that is a matter of policy clearly within the legislative competence. See the discussion by Judge Wyzanski in Textile Workers Union v. American Thread Co., D. C. Mass. 1953, 113 F. Supp. 137. See also Textile Workers Union v. Arista Mills Co., 4 Cir., 1951, 193 F. 2d 529, 533; Wechsler, 'Federal Jurisdiction and the Revision of the Judicial Code,' 13 Law & Contemp. Prob. 216, 224 (1948); Mishkin, 'The Federal "Question" in the District Courts,' 53 Col. L. Rev. 157 (1953); Wollett and Wellington, 'Federalism and Breach of the Labor Agreement,' 7 Stanford L. Rev. 445, 475-79 (1955)."

This Court is in agreement with the decision of Chief Judge Magruder, and has concluded after reading the cited opinion, as it had prior to that time, that §301(a) is constitutional.

The second principal question is whether the court should stay the instant proceeding pending arbitration. This involves the issue as to whether the collective bargaining agreement is a "contract of employment" within the meaning of the Arbitration Act. 9 U. S. C. A. §1 et seq. and further whether there is an arbitrative question under the contract if it is not a "contract of employment." The decisions are not in accord. United E. R. & M. Workers v. Miller Metal Products, Inc., (4 Cir. 1954) 215 F. 2d 221; Pennsylvania Greyhound Lines, Inc v. Amalgamated Ass'n. of Street Electric Ry., and Motor Coach Workers of America et al. (3 Cir. 1952) 193 F. 2d 327.

This question has now been settled conclusively for the Sixth Circuit in Hoover Motor Express v. Teamsters, Chauffeurs, etc., Local Union No. 327, (6 Cir. 1954) 217 F. 2d 221; Pennsylvania Greyhound Lines, Inc. v. Amalga- the union for breach of no-strike clause in a collective bargaining agreement that the agreement is not a contract of employment.

The court distinguished its decision in Gatliff Coal Co. v. Cox, (6 Cir. 1944) 142 F. 2d 876.

It should also be pointed out that in the Hoover Motor Express Co. supra, there was no suggestion by the court that there was a failure to state a claim upon which relief could be granted. Defendants contend, however, that regardless of the application of the Arbitration Act they are entitled to have the present dispute submitted to arbitration under the provisions of the collective bargaining agreement. The arbitration section of that agreement is §6 of Art. III. It is the final step of the grievance procedure and provides:

> "In the event any grievance relating to the meaning or application of this agreement is not satisfactorily disposed of in the foregoing steps of the grievance procedure, either party may submit the unsettled grievance to an impartial arbitrator * * *."

Similar contracts have been held to present no arbitrable disputes or questions. Square D Company v. U. E. W., 123 F. S. 776, (E. D. Mich. 1954), held that no arbitrable question was presented on which defendants' motion for stay of proceedings could be upheld because the contract did not contemplate arbitration of the strike there involved.

The court concluded that this was demonstrated by the collective bargaining agreement, wherein the arbitration provision was but the final step in the procedure by which employees' grievances could be settled. See also United Electrical, etc. v. Mille Metal Products, Inc., 215 F. 2d 221 (4 Cir. 1954), and Metal Polishers, etc. v. Rubin, (Pa. 1949) 85 F. 2d 363, wherein it was stated:

> "* * * under a labor agreement which expressly forbids strikes and lockouts pending the arbitration of dispute, it is not reasonable to suppose that damages resulting from a strike or lockout were contemplated as the subject of arbitration."

The court is satisfied that the contract in the instant case and the provisions for settlement of grievances were intended to avoid strikes and not to settle them. This court

is not convinced that any of the parties to the contract contemplated that the issue of the company's right to damages for an alleged illegal strike or work stoppage should be submitted to an arbitrator rather than to the courts. That arbitrable issues may have lead to the illegal strikes or work stoppages is possible and even probable, but a strike as such does not appear to be such an issue within the terms of the contract. As was stated by the Sixth Circuit in Hoover Motor Express v. Teamsters, etc. at page 53:

> "In the commonly accepted meaning of the term 'grievance,' violation of a no-strike provision in a collective bargaining agreement does not constitute a grievance." and see the cases therein cited.

The court went on to say at p. 54:

> "We think that under the principles laid down in the authorities cited above the calling of the strike did not constitute a grievance; that it therefore was not subject to the settlement procedure of Art. VIII. Section 1 of the contract contemplates that complaints of employees which might eventually culminate in a strike, namely, grievances, were to be settled in a certain manner under Section 1, but the violation of the no-strike agreement of the collective bargaining contract is not a grievance. The record presents no provision that such a situation shall be arbitrated."

Defendants contend, however, that the determination as to the arbitrability of any issue alleged to arise under the collective bargaining agreement must in the first instance be made by an arbitrator rather than by a court. We are not in accord with this position. No good reason has been stated for submitting the question of arbitrability to an arbitrator under the circumstances.

A question remains as to whether the defendant, International Union, was a party to the collective bargaining contract in question in this case. Square D Company v. United Electrical, Radio & Machine Workers of America

et al., (E. D. Mich. 1954) 123 F. S. 776, has been cited with respect to the problem here under discussion. However, an examination of that decision is of little assistance because the contract is not set forth nor is there any discussion indicating how the court arrived at his conclusion.

Attention is also called to U. E. W. v. Oliver Corp. (8 Cir. 1953) 205 F. 2d 376, wherein the International was found to be a party to the contract.

In Boeing Airplane Co. v. Aeronautical Industrial Dist. Lodge No. 751, of International Assn. of Machinists et al., (D. C. Wash. 1950) 191 F. S. 596, the court sets forth and considers the general rules ofor the construction and interpretation of the contracts.

In the instant case it is difficult to determine from the language exactly what was intended by the parties. However, in Article I, Section 1, it is stated:

> "The company agrees to recognize *the Union* as the exclusive collective bargaining agency * * *."

In Article II, Section 1, it is stated:

> "For the purpose of collective bargaining *the Union* will be represented by a shop committee of nine members all of whom shall be employed by the Company."

And in Article II, Section 3:

> "The Local 880 Bargaining Committee shall have the right to have an International representative and Recording Secretary present at any meeting."

Reference is made in another provision of the contract to "*the Union*" and elsewhere reference is made to the Bargaining Committee and the Shop Committee. The contract was signed by the Bargaining Committee, the International representative, and the Regional Director, as well as by representatives of the plaintiff company. It would appear to the court that there is at least a question of fact on which proofs should be received as to

whether the International Union was intended to be a party to the contract in question.

Finally, to be considered is defendants' motion to vacate the notice of taking depositions and to quash the subpoenas. The issue of quashing the subpoenas is now moot and will be determined by the decision relative to the motion to vacate the notice of taking depositions. In this connection it appears that plaintiff, through its counsel, served notice of an intention to take the deposition of "International Union, United Automobile and Aircraft and Agricultural Workers of America (UAW-CIO)," and also of "Benton Harbor Malleable Local No. 880 of International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO), upon oral examination before Weber Sterling, a Notary Public in and for the County of Berrien, State of Michigan." No authority has been cited to the court which is directly applicable to labor unions or other unincorporated associations.

However, the court calls attention to 7 Cyc. Fed. Proc. §25.22:

> "The deposition of a corporation may be taken through an officer, director or managing agent thereof, and only through a person in such relationship to the corporation."

It is further stated in 7 Cyc. Fed. Proc., §25.88:

> "An employer or other party cannot be required to assume the responsibility of determining what officers, employees or witnesses it should produce where the notice of taking of deposition insufficiently designates them."

See also Barron & Holtzoff Federal Practice and Procedure §714.

Exception is also raised as to certain subpoenas which require the production of documents. The court has not been furnished with copies or the originals of the sub-

poenas and is unable to determine the question at this time.

For the reasons herein stated the court finds as follows:

1. Plaintiff's compiaint states facts upon which relief could be granted;

2. Section 301(a) of the Labor Management Relations Act of 1947, (29 U. S. C. A. §185(a)), is constitutional;

3. The collective bargaining agreement is not a contract of employment;

4. The question of an illegal strike is not an arbitrable issue;

5. A claim for damages for an illegal strike or work stoppage is properly submitted to the court;

6. The determination of whether the International Union is a party to the collective bargaining agreement is subject to proof;

7. Defendants are not entitled to a stay of proceedings pending arbitration;

8. The notice of taking the deposition of the International Union and the deposition of the Local Union are too vague to identify the parties and the notices are vacated, provided, however, that plaintiff shall have a right to renew such motion upon proper identification of the persons whose depositions it desires to take, and

9. The court does not rule upon the propriety of the subpoenas duces tecum, but suggests that a motion to produce be filed if production is refused.

For the above reasons the motion to dismiss is denied; the motion to stay proceedings is denied; the motion to vacate the notice of taking of deposition of the International Union and the Local Union is granted as above stated; the motion to quash subpoenas is denied.

W. Wallace Kent,
Judge, United States District Court.

May 28, 1958.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 1028

INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW-AFL-CIO),

and

BENTON HARBOR MALLEABLE LOCAL No. 880 of International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-AFL-CIO),

Petitioners,

v.

BENTON HARBOR MALLEABLE INDUSTRIES,

Respondent

PETITON FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

HAROLD A. CRANEFIELD,
KURT L. HANSLOWE,
REDMOND H. ROCHE, JR.,
Attorneys for Petitioners,
8000 East Jefferson Avenue,
Detroit 14, Michigan.

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners, International Union, UAW and Local No. 880, UAW, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the District Court is not reported. The opinion of the Court of Appeals has not yet been reported in the West System, but appears at 39 LRRM 2689. The opinion of the District Court is printed in the record, pp. 20a to 28a. The opinion of the Court of Appeals is printed in the Appendix pp. 1b-9b; *infra*.

JURISDICTION

The Judgment of the Court of Appeals was entered March 29, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTIONS PRESENTED

1. Under a collective bargaining contract which prescribes a grievance and arbitration procedure for disposing of any "difference * * * between the company and the union as to the meaning and application of this agreement", should a suit alleging breaches of the strike-lockout prohibition clause of the contract be stayed pending arbitration of the alleged breaches?

2. Under such a contract, should the very question of arbitrability of the alleged breaches, in the first instance, be decided by an arbitrator since that very question necessarily involves the "meaning and application" of that part of the contract which proscribes strikes and lockouts and prescribes arbitration of any "difference"?

STATUTES INVOLVED

The statutory provisions involved are Sections 201, 203 (d), and 301 of the Labor-Management Relations Act of 1947, as amended, 61 Stat. 152, 153 and 156, 29 U. S. C. 171, 173(d) and 185, all respectively; and Sections 3 and 4 of the United States Arbitration Act, 61 Stat. 669, 9 U. S. C. 3 and 4. These statutes are set forth in the Appendix pp. 10b-14b, *infra*.

STATEMENT

On June 24, 1952, plaintiff-respondent, a Michigan corporation, producing malleable, grey iron and die castings for sale in interstate commerce, filed a civil complaint in the United States District Court for the Western District of Michigan against defendants-petitioners alleging, in substance, two separate breaches of contract. The action was filed under Section 301 of the Labor-Management Relations Act of 1947, as amended, (29 U. S. C. 185). These allegations of breach were based upon the claim that strikes in March and June of 1952 were in breach of a strike-lockout prohibition clause in the collective bargaining agreement of February 26, 1952 (pertinent portions of which are printed in R. 8a-15a) then existing between the petitioners

and the respondent.[1] On May 13, 1953, respondent filed an amended and supplemental complaint reiterating the allegations of the original complaint and adding an allegation of a breach of the strike-lockout prohibition clause commencing in April of 1953 (R. 2a-13a).

The breaches of contract alleged by respondent are set forth as violations of Article III, Section 1 of said contract of February 26, 1952 (R. 10a-12a). This article is entitled "Grievance Procedure". Said Section 1 also introduced a procedure for settling any "difference * * * between the company and the union as to the meaning and application of this agreement", culminating in Section 6 of said Article III which provides for an impartial umpire to which "either party may submit the unsettled grievance".

Relying on this contract language, petitioners, on June 3, 1953, filed in the District Court a motion, *inter alia*, to stay proceedings pending arbitration pursuant to Section 3 of the United States Arbitration Act (29 U. S. C. 3) (R. 16a-20a).

On May 28, 1956, the District Court for the Western District of Michigan handed down an opinion (R. 20a-28a) which, among other things denied petitioners' alternative motion to stay proceedings pending arbitration and on the same date entered an order in accordance with said opinion.

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[1] Included in the record reference to pertinent contract provisions at pp. 14a-15a is a one-page supplement to said collective bargaining agreement of February 26, 1952 which supplement is dated February 29, 1952. Though not included as an exhibit to respondent's complaint or supplemental complaint, a copy of this supplement, in the absence of an answer, was attached to one of petitioners' briefs to the District Court. The authenticity of this supplement is not in question, its genuineness having been admitted by the respondent's attorney in a hearing held before he District Court on December 2, 1954.

Petitioners appealed the denial of the alternative motion to stay to the Court of Appeals for the Sixth Circuit which, on March 29, 1957, entered a decision and order affirming the District Court. The Sixth Circuit's decision held that the provisions of the collective bargaining contract proscribing a grievance and arbitration procedure providing for settlement of differences between the parties as to the meaning and application of the contract excluded from its application those differences which arose as a result of an alleged breach of the strike-lockout prohibition clause. Prior to reaching this issue, the Sixth Circuit also held that the question of the arbitrability of the respondent's allegations would be decided, in the first instance, by the Court rather than an arbitrator; and that for want of an answer, the issues involved in respondent's cause of action were not sufficiently defined.

REASONS FOR GRANTING WRIT

1. The primary issue involved in this case is nothing less than the basic approach of federal courts to arbitration provisions in collective bargaining contracts. Reduced to its naked essentials, the decision of the Sixth Circuit herein held that an arbitration clause in such a contract, regardless of the generality of its wording, did not apply to that class of alleged breaches which involved the strike-lockout clause. The entire rationale of this decision, (which is supported by decisions of other circuits as noted in the decision herein, and is in conflict with the decisions of the Second circuit as discussed herein below) is that a general arbitration clause in a collective bargaining contract is intended to prevent breaches of the strike-lockout prohibition clause by providing a peaceful procedure for settling alleged breaches of at least some other contract

provisions (i.e., "grievances") which could motivate a strike or lockout, but is inapplicable to an alleged breach of said strike-lockout prohibition clause.

Petitioners believe this issue is ripe for decision by this Court. Since the adoption of the present Labor-Management Relations Act some ten years ago, there has been a constantly increasing volume of litigation under Section 301 of that Act (29 U. S. C. 185) in which plaintiffs have alleged violations of such strike-lockout prohibition clauses. A recent survey by the Bureau of National Affairs indicates that some 89% of collective bargaining contracts contain both arbitration provisions and strike-lockout prohibition clauses. "Collective Bargaining Negotiations and Contracts", pp. 51:1, 77:1. The volume of litigation which is developing on the interrelationship between arbitration provisions and alleged breaches of strike-lockout prohibition clauses is indicated by the cases cited by the Sixth Circuit on pp. 7b and 9b of its decision herein. These decisions are by no means an exhaustive list of even those cases where a stay was sought and refused. Most District Court cases where such a result was reached are not cited. Cases where the stay was allowed, including the very significant decision in *Signal Stat Corp. v. United Electrical Workers;* 235 F. 2d 298 (C. A. 1956), Cert. applied for, Docket No. 520, are not noted in the decision herein.[2]

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[2] In addition to Signal Stat, some cases in which stays were allowed in situations involving alleged breaches of strike-lockout prohibition clauses are: *Regent Quality Furniture Company v. Pollack*, 26 LA 302 (N. Y. Sup. Ct. April 13, 1956); *Lewittes and Sons v. United Furniture Workers*, 95 F. Supp. 851 (D. C. N. Y. 1951); *Brady Transfer and Storage Company v. Meat Drivers Union*, 30 LRRM 2535 (D. C. Ill. 1952); *Pennsylvania Greyhound Lines v. Amalgamated Association of Motor Coach Employees*, 98 F. Supp. 789, (D. C. 1951); reversed on other grounds, 193 F. 2d 327 (C. A. 3, 1952).

This increasing volume of litigation involves the public policy of the United States to encourage settlement of *all* labor disputes by arbitration and other methods agreed to by the parties concerned (29 U. S. C. 171 and 173.(d)). For the courts to encourage arbitration of labor disputes through granting stays in suits alleging *any* type of contract breach where the contract prescribes arbitration for settlement of any "difference * * * as to the meaning and application of this agreement" is in substantial furtherance of this public policy. The consequences are far more important than merely substituting one adjudicative body for another. A court trying a suit for alleged breach of a strike-lockout prohibition clause is necessarily solely concerned with the legal issue of a breach of contracts and the legal measure of damages. Arbitrators, on the other hand, can, should and do weigh other factors in their efforts to reestablish harmonious labor relations in the disputed area. For example, in arbitration awards such as *Par-Metal Products Corp.*, 4 LA 794, and *M. Singer and Sons*, 13 LA 533, arbitrators, while recognizing their authority to award damages for breaches of strike-lockout prohibition clauses, exercise their discretion to decline such awards because, under the circumstances, it would regenerate "antagonisms and finally have been dissipated" and not be in furtherance of the general purpose of industrial peace. While either party could, of course, challenge the arbitrariness or reasonableness of an arbitrator's award in a court, it is, nonetheless, equally true (whether the issues involved in a party's claim concern the existence or non-existence of a breach, the amount of damages for any such breach, the propriety of a disciplinary discharge, or any of the myriad subjects that might involve "meaning and application" of the contract), that the basic orientation of an arbitrator, making the *initial* determination will naturally be towards reestablishing a harmonious

bargaining relationship, while that of a court making the *initial* determination will necessarily be *solely* concerned with plaintiff's right (or lack thereof) to monetary compensation for the alleged contractual wrong, an extremely important and consequential contrast.

If the respondent here had submitted its claim of alleged breaches to an arbitrator in the first instance, it is not unlikely that a solution restoring satisfactory production and employment could have been reached through the arbitrator's decision or mediation, these not being mutually exclusive concepts in arbitration proceedings. By having recourse to court where the petitioners' request for a stay was denied, respondent clearly did not increase the possibility of a speedy restoration of satisfactory bargaining relationships. Petitioners contend that enforcement of recourse to arbitration through allowance of a stay is not only desirable in that it gives effect to the parties' basic preference for the arbitration approach to their allegations of breach as expressed in the contract's general arbitration provision,[3] but is in accord with the Congressional declarations of public policy in this area.

Signal Stat Corp. v. United Electrical Workers, 235 F. 2d 298 (C. A. 2, 1956), Cert. applied for, Docket No. 520, while involving certain language which differs in unimportant and irrelevant particulars from the contractual.

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[3] A very recent decision of the New York Court of Appeals, *In re Potoker*, 28 LA 344 (April 4, 1957) is apropos of this precise point. The court was dealing with an attempt to compel arbitration of certain claims. In approving the allowance of an injunction compelling arbitration, the court stated at pp. 346-7:

> "* * * the issue is not whether petitioner is right, but whether it is entitled to have the issues determined in the forum designated in the agreement. * * * Accordingly, whether or not the Guild called a strike in breach of the 'no-strike' clause, constitutes no defense to this motion to compel arbitration * * *."

language herein (see note 4, *infra*), cannot be harmonized with the decision herein. Inevitably, it would seem that the two cases, if submitted to the same court, would be similarly decided (i.e., the stay would have been granted by the Second Circuit in our case and denied by the Sixth Circuit on the *Signal Stat* contract).

The conflict between these two cases involves fundamentally different approaches to arbitration provisions in collective bargaining contracts in the numerous class of cases where one party alleges certain breaches of the strike-lockout prohibition clause, and perhaps otherwise. It is, no doubt, the differing approaches of the Circuits to public policy considerations, as well as to the even more basic issue of encouraging private arbitration, rather than the often minimal and inevitable differences in contract language that have produced the existing conflict among the Courts of Appeal. This is not to say that any two given contracts might not differ in important particulars so as to necessitate differing conclusions by a given court, following a given approach.[3] This, indeed, was the case in relation to the contracts involved in the Second Circuit's decisions in *Signal Stat v. United Electrical Workers*, *supra*, and *Markel Electric Products v. United Electrical Workers*, 202 F. 2d 435 (C. A. 2, 1953).[4] Substantial numbers of collective-bargaining contracts, however, including those involved in *Signal Stat v. United Electrical Workers*,

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[4] The arbitration provisions in *Markel* are distinguishable from those in *Signal Stat* (and from those involved herein) on two identical points. In *Markel*, the contract set forth a grievance and arbitration procedure for any difference "between the company and any employee" in contrast with the contractual language in *Signal Stat* which set forth a procedure between "the parties" (i. e., the company and the union). In *Markel* the contract provided only that the party "filing" the grievance could submit the same to arbitration as contrasted with *Signal Stat* in which it was provided that "either party" might so submit.

supra, and herein, contain so-called general arbitration provisions providing a means of settling differences or disputes between the parties (or the company and the union) as to the meaning and application of the agreement, with either party having the right to proceed to arbitration.

This basic conflict in approach and reasoning which inevitably appears to require conflicting results on exactly identical contractual language is highlighted by that portion of the Second Circuit's decision in *Signal Stat v. United Electrical Workers*, *supra*, where after noting the substantial differences in language between the contract

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The arbitration clause in the instant case is assimilable to that in *Signal Stat*, and is distinguishable from that in *Markel*, for the same reasons the Second Circuit distinguished *Signal Stat* from *Markel*. The fact that the contract in *Signal Stat* provides for "the difference, dispute or grievance" to be submitted by either party to arbitration is not a significant difference from the contract in the instant case providing simply that the "grievance" may be so submitted by either party. The contract in *Signal Stat* uses the term "grievance" as the equivalent of "difference, dispute or grievance", in the sentence providing for submission to arbitration. That sentence reads:

> "If no satisfactory settlement is arrived at, within 10 days of the date of the filing said grievance, then the difference, dispute or grievance shall at the request of either party, be immediately submitted for arbitration."

In the same way, "difference" in Section 1 of Article III of the contract herein must be equated with "grievance" in the phrase "either party may submit the unsettled grievance to an impartial arbitrator" in Section 6 of that Article (R. pp. 10a-11a). Otherwise, respondent's argument below that only an individual could institute a grievance would artificially restrict the broad provisions for settling the meaning and application of the contract to such differences as could be raised by an individual employee, an obviously artificial result in that it would exclude any number of matters in addition to alleged breaches of the strike-lockout prohibition from the grievance and arbitration procedure, including discharges which are treated in Article VI of the Contract (R. 12a-13a) and nowhere called grievances, as well as the numerous important disputes the union might wish to settle on its own behalf that could arise under Article II of the contract (R. 9a-10a) dealing with representation, bargaining committees, etc.

involved in its earlier decision in *Market Electric Products Co. v. United Electrical Workers*, *supra*, and the contractual language in the subject case (see note 3, *supra*), the Court remarks at p. 301:

> "* * * To the extent that the other cases cited by plaintiff require a contrary result, we think them erroneous. [Citing *United Electric R. & M. Workers v. Miller Metal Products*, 215 F. 2d 221, (C. A. 4); *International Union v. Colonial Hardwood Floor Co.*, 168 F. 2d 33, 35, 2102 (C. A. 4); *Square D Co. v. United Electric R. & M. Workers*, 123 F. Supp. 776, 2627]. We think their interpretations of similar arbitration clauses are unduly restrictive and achieve, by indirection, the same result as the old, and now generally rejected, judicial-aversion to enforcing arbitration agreements. [Citations.] Other cases, with which we agree, support our decision that the instant arbitration agreement covers a dispute arising from an alleged breach of the no-strike clause." [Citations including *Pennsylvania Greyhound Lines v. Amalgamated Ass'n.*, *infra*, this brief].

Inclusion of *International Union v. Colonial Hardwood Floor Co.* in the category of those cases which the Second Circuit felt, at least in part, "erroneous" (all of which cases were cited with approval by the Sixth Circuit herein though *Signal Stat* itself was not noted, perhaps because the Sixth Circuit itself recognized the basic irreconcilability) highlights this conflict of approach. *Colonial Hardwood* was the first Court of Appeals' decision involving application for a stay by a defendant who was alleged to have breached a strike-lockout prohibition clause. The court in Colonial Hardwood held, among other things, that a suit for a breach of a no-strike clause in a collective bargaining contract did not involve "any issues referable to arbitration" under

the arbitration language of the particular contract.[6] Apart from language considerations, however, the Fourth Circuit in *Colonial Hardwood* initiated a general approach to the question of stays pending arbitration in suits alleging breaches of strike-lockout prohibition clauses which has since been followed by other Circuits, including the Sixth Circuit in its decision herein. In *Colonial Hardwood*, the Fourth Circuit laid down a general rule of construction to the effect that arbitration clauses were not intended to cover actions involving such breaches but, on the contrary, were intended to prevent strikes and lockouts by settling their motivating causes. "We believe it was this general reasoning and attitude which Judge Frank in *Signal Stat* condemned as "erroneous" and a restoration "by indirection * * * [of] the same result as the old, and now generally rejected, judicial aversion to enforcing arbitration agreements". The Sixth Court of Appeals herein quite apparently adopts this reasoning of the Fourth Circuit, in opposition to that of the Second Circuit, which has produced the differing results as between *Signal Stat* and the case herein on substantially similar contracts.

It is also, perhaps, worthy of note that while the Third Circuit has not passed directly on this point, the *Signal Stat* decision cites "*Pennsylvania Greyhound Lines v. Amalgamated Ass'n*, 98 F. Supp. 789, 791, reversed on other grounds, 193 F. 2d 327, (C. A. 3)" as one of those cases "with which we agree" and which "support our decision that the instant arbitration agreement covers a dispute arising from an alleged breach of the no-strike clause".

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[6] In fact, though the decision does not disclose the contract language, another court in *Lewittes & Sons v. Furniture Workers, supra*, points out that the contractual language in *Colonial Hardwood, specifically limited* the grievance and arbitration provisions to disputes involving "hours and other conditions of employment".

This *Greyhound* decision has particular significance in that at p. 791 it practically paraphrased the reasoning of the Fourth Circuit in *Colonial Hardwood*, succinctly rebutted this reasoning and reached a contrary result.

The increasing volume of litigation of this type in which federal courts are faced with deciding whether to compel resort to arbitration in accordance with general language prescribing a grievance and arbitration procedure for settling differences, or permit one party to directly proceed with its claim to court and thus harden and freeze the dispute (i.e., tend to indefinitely prolong the strike or lockout) in contradiction of federal public policy and present day concepts of flexible and pragmatic labor relations, would seem to require treatment of the issue presented herein by this Court. The basic conflict which exists between the Second Circuit (and perhaps the Third), and the Fourth and Sixth Circuits (and probably the Seventh) cannot be avoided. Each suit involving general arbitration language in which a stay is denied at least minimizes the reversal of the preexisting adverse judicial climate to arbitration agreements intended by Congress in its passage of the United States Arbitration Act some thirty years ago (9 U. S. C.). See *Sturges & Murphy, Some Confusing Problems Relating to Arbitration Under the United States Arbitration Act*, 17 Law and Contemporary Problems 580. Such denials likewise minimize public policy favoring arbitration and early settlement of *all* disputes under collective bargaining contracts. The decision herein, as well as the decisions of other Circuits, not only conflict with the Second Circuit's decision in *Signal Stat Corp. v. United Electrical Workers, supra* but are at least generally inconsistent with much earlier decisions of that Circuit involving commercial arbitration provisions. See *Shan-*

feroke Coal and Supply Co. v. Westchester Service Corp., 70 F. 2d 297 (C. A. 2, 1934), aff. 293 U. S. 449, 55 S. Ct. 313 (1935); *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F. 2d 978 (C. A. 2, 1942). In the case of *In re Pahlberg Petition*, 131 F. 2d 968 (C. A 2, 1942) the court quotes from the famous English case of *Heyman v. Darwins* (1942) A. C. 356 the following language which, petitioners contend, should be established by this Court as a guide to all lower federal courts in their consideration of cases under Sections 3 and 4 of the United States Arbitration Act:

> "* * * But, in a situation where the parties are at one in asserting that they entered into a building contract, but a difference has arisen between them whether there has been a breach by one side or the other, or whether the circumstances which have discharged one or both parties from further performance, such differences should be regarded as differences which have arisen 'in respect of,' or 'with regard to,' or 'under' the contract, and an arbitration clause which uses these, or similar expressions should be construed accordingly."

2. The Sixth Circuit herein also declined to recognize that general arbitration language should, in the first instance, require the basic issue of the arbitrability of the claim of alleged breach of the strike-lockout prohibition clause (which question of arbitrability is controlled by the meaning and application to be given the grievance and arbitration provisions of the contract) to be submitted to an arbitrator. The court apparently based this decision on the statutory language of Section 3 of the Arbitration Act. (App. 13b), which provides in part that "the Court * * *, upon being satisfied that the issue involved in such

suit or proceeding, is referable to arbitration under such an agreement" shall issue a stay.

There are relatively few decisions on the point but the Sixth Circuit herein is in seeming conflict with the First Circuit's decision in *United Electrical Workers Local 205 v. General Electric Company*, 233 F. 2d 85 (C. A. 1, 1956), which decision has been appealed to and argued before this court on March 26, 1957 (Docket No. 276), and on the date of printing of this petition, was awaiting decision. In that decision, though dealing with an application for an order compelling arbitration under Section 4 of the Arbitration Act (App. 13b), the court states at p. 101:

> "* * * [An] arbitration clause, either expressly or by broadly stating its scope to include disputed interpretations of any contract term, may refer the very question of arbitrability to the arbitrator for decision * * *. Thus the district court must first determine whether the contract in suit puts matters of arbitrability to the arbitrator or leaves them for decision by the court. If it is the latter, the court must decide such points before it can give relief *under Sections 3 or 4 of the Arbitration Act.* If it is the former, and the applicant's claim of arbitrability is not frivolous or patently baseless, an order can be given, with the decision on arbitrability to be made in the arbitration proceedings that follow * * *." (Emphasis supplied.)

Judge Magruder apparently saw no difference in principle between stay cases and those in which an injunction compelling arbitration is sought (i.e., Section 3 and Section 4 cases, respectively, under the Arbitration Act). The area of conflict would appear to center on whether the statutory language quoted above requires a different approach and differing results between Section 3 and Section 4 cases.

A different result would not be justifiable in principle, and is not necessitated by the statutory language which Judge Magruder apparently felt only injects the court in Section 3 cases to the extent of determining whether the moving party's claim that the issue is arbitrable is "frivolous or patently baseless".[7]

This specific problem is actually not clearly severable from the point discussed in Section 1, *supra*. On each issue, the decision herein reflects an unrealistic and outmoded reluctance to recognize and enforce the parties' contractually expressed preference for arbitration of *any* differences as to the meaning and application of the contract. This reluctance is expressed by the court's refusal to recognize the general arbitration language, and its insistence on reading its own limitations into this language which clearly and generally prescribes arbitration for the settlement of all such differences; and example of the "old judicial hostility to arbitration" which it was "the clear intention of Congress" to reject in its enactment of the Arbitration Act. See *Kulukundis Shipping Company v. Amtorg Trading Corporation*, *supra*, pp. 983-985. In one instance, the Sixth Circuit decided that a question as to the meaning and application of the *arbitration* clause was, for certain general reasons, excluded from the arbitration procedure, and in the other instance, it determined that a question as to the meaning and application of the *strike-lockout prohibition* was, again, basically for the

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[7] Other decisions where the court referred the question of arbitrability of the issues involved in the dispute to arbitration for initial decision, all of which cases involved an attempt to compel arbitration rather than stay proceedings are: *Auto Workers Local 379 v. Jacobs Manufacturing Co.*, 120 F. Supp. 228 (D. C. Conn., 1953); *Post Publishing Company v. Cort*, 134 N. E. 2, 431 (Mass Sup. Ct. 1956); *Wilson Bros. v. Textile Workers Union*, 132 F. Supp. 163 (D. C. N. Y. 1954).

same general reasons, excluded from the application of the arbitration provisions. Such *policy* limitations of general arbitration provisions, in the absence of specific contractual limitations on the otherwise general arbitration provisions, can have only the most pernicious effect on the bulk of collective bargaining contracts which contain general grievance and arbitration procedures, with or without strike-lockout prohibition clauses.

Aside from the correctness of the position of the Sixth Circuit herein on these two closely related points, these issues appear to require settlement by this Court to remove the uncertainty which now beclouds the situation,[8] and which uncertainty can produce only harmful results. Even a decision contrary to the petitioners' contention would be an improvement on the current uncertainty if only that it would diminish the freezing effect of processing a claim of breach in court by avoiding the additional delay (during which a strike or lockout presumably would continue) involved in the application for stay and consequent appeals.

3. Also involved in the Sixth Circuit's decision is its determination that the issues involved in respondent's claim of alleged breaches of the strike-lockout prohibition clause were insufficiently defined. Of course, it is common in such cases that filing of the answer is postponed pending determination of the motion for a stay (*Signal Stat v. United Electrical Workers, supra*), such being au-

[8] The area of uncertainty is, of course, primarily in those several circuits which have not yet considered these problems, and in which a litigant could not know whether the circuit in question would follow the reasoning of the Second Circuit, or that exemplified by the Sixth Circuit's decision herein. Whichever of these two approaches would be adopted by a given circuit would naturally lead to a differing decision except in those relatively rare contracts where the language is so unequivocal either way as to permit only one result.

thorized by Rule 12(b) of the FRCP (28 U. S. C.). *Evans v. Hudson Coal Co.*, 165 F. 2d 970 (C. A. 3, 1948).

Other courts have commented that the court hearing the motion for a stay must accept the moving party's version of the issues. *Shanferoke Coal and Supply Co. v. Westchester Service Corp.*, 70 F. 2d 297 (C. A. 2, 1934), aff. 293 U. S. 449, 55 S. Ct. 313 (1935); *Wilson & Co. v. Fremont Cake and Meal Co.*, 77 F. Supp. 364 (D. C. Neb. 1948). The *Wilson* decision, though that of a district court, is particularly apposite because of its succinct treatment of this issue on p. 379 where the court states:

> "Then, it is contended that there is nothing in the case upon which arbitration may be had, that the only possible issue is the amount of damages. The plaintiff may consider—may even know—that contention to be true. But at this point in the pleadings, the court may not assume that it is. It cannot be known, with assurance, what issues will be raised by the defendant's answer. But even if the plaintiff's theory be factually accurate, and nothing is involved but damages, that question is arbitrable." [Citing cases.]

The Sixth Circuit's decision on this point is not only unreal, but inconsistent with that of the Second Circuit in *Shanferoke Coal and Supply Co. v. Westchester Service Corp., supra*, adopted by this court with approval, which, we contend, recognized that the purpose of Section 3 of the Arbitration Act would be largely negated if the parties had to first engage in extensive litigation to define the issues. That Congress intended to avoid this neutralization of Section 3 is the square holding of the Third Circuit in *Donahue v. Susquehanna Collieries Co.*, 138 F. 2d 3 (1943). The matter is discussed in Section 1 of that decision ap-

pearing on p. 4, which specifically refutes the unreal position of the Sixth Circuit herein on this question.[9]

The decisions of the Second and Third Circuits noted above on this point anticipate and prevent the delay and complications, which the Sixth Circuit's decision would inject into any motion for a stay pending arbitration. The Sixth Circuit's result has particularly pernicious consequences in those cases where the plaintiffs have alleged violations of collective bargaining contracts since, as heretofore noted, one of the chief advantages of arbitration in such cases is the promotion of a speedy resolution of the issues by adjudication and mediation within the primary focus of preventing any freezing of position and promoting a return of satisfactory, even harmonious, collective bargaining relationships and early resumption of production and employment. The Sixth Circuit's view that it is necessary to precisely define the issues prior to invoking the Arbitration Act is unsupported by authority, in conflict with decisions of the Second and Third Circuits, and negates a speedy and effective application of arbitration provisions to collective bargaining disputes. The consequences of the Sixth Circuit decision herein will neces-

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[9] This case presents important issues on the meaning and application of the strike-lockout prohibition clause to which this Court has already held there can well be implied exceptions, though the precise nature of such exceptions in any given case varies with the language of the contract as well as the collective bargaining history and other related factors. *Mastro Plastics Corp. v. N. L. R. B.*, 214 F. 2d 462 (2 C. A. 1954) aff. 76 S. Ct. 349 (1956); *N. L. R. B. v. Wagner Iron Works, et al.*, 220 F. 2d 126 (C. A. 7, 1955) cert. denied, 76 S. Ct. 406 (1956). The case also involves interpretation and application of the express exception to the strike-lockout prohibition clause contained in the February 29, 1952 Supplemental Agreement. (R. 14a-15a). These questions along with others which would be herein involved, including the obvious question of damages if respondent's allegations should be upheld, are particularly appropriate subjects for the arbitration process to initially treat. See *Council of Western Electric Technical Employees v. Western Electric Co.*, 238 F. 2d 892, 897 (C. A. 2, 1956).

sarily affect substantial numbers of such disputes which might otherwise be speedily settled or avoided altogether.

4. In summary, petitioners respectfully submit that all facets of the Sixth Circuit's decision herein, in view of the important general application of that decision and its conflict with decisions of other Circuits, should be considered and reversed by this Court.

CONCLUSION

For the reasons stated herein, it is respectfully requested that a petition for a writ of certiorari should be granted.

Respectfully submitted,

HAROLD A. CRANEFIELD,
KURT L. HANSLOWE,
REDMOND H. ROCHE, JR.,
Attorneys for Petitioners,
8000 E. Jefferson,
Detroit, Michigan.

APPENDIX

OPINION AND JUDGMENT BELOW

(Filed March 29, 1957)

No. 12920

UNITED STATES COURT OF APPEALS
for the Sixth Circuit

INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT, etc., et al., *Appellants*, v. BENTON HARBOR MALLEABLE INDUSTRIES, *Appellee*.	APPEAL from the United States District Court for the Western District of Michigan.

Decided March 29, 1957.

Before: ALLEN, McALLISTER and MILLER, Circuit Judges.

MILLER, Circuit Judge. The appellee, a Michigan corporation, having its principal offices in Benton Harbor, Michigan, filed this action in the District Court against the appellants, International Union and Local No. 880, United Automobile, Aircraft and Agricultural Implement Workers of America, seeking damages by reason of strikes and work stoppages in violation of the collective bargaining agreement on the part of its employees at various plants of the appellee.

Jurisdiction is based upon Section 301 of the Labor Management Relations Act of 1947, Section 185, Title 29, U. S. Code, *Shirley-Herman Co. v. Internat'l Hod Carriers, etc.*, 182 F. (2d) 806, C. A. 2nd; *Hamilton Foundry & M. Co. v.*

International M. & F. Wkrs; 193 F. (2d) 209, 214, C. A. 6th; cert. denied 343 U. S. 966.

The amended and supplemental complaint, after making necessary jurisdictional allegations, stated that on February 26, 1952 the appellants and appellee entered into a written contract covering wages, hours of work, conditions of employment, the method of adjusting alleged grievances and other matters with respect to the employees of the appellee who were being represented by the appellants, which contract was in force and effect at the times complained of. Article III, paragraph 1 of the contract provided as follows:

> 1. Shall difference arise between the Company and the Union as to the meaning and application of this Agreement, or should any local trouble arise, an earnest effort shall be made to settle such differences, and it is agreed by the Union that there shall be no strike, slowdown or stoppage of work on the part of the Union or its members and there shall be no lockout on the part of the Company during the term of this contract. The parties shall in all instances resort to the following steps of the grievance procedure.

It further stated that the appellee had at all times fully performed and complied with the terms and conditions of the contract, but notwithstanding the said contract and in violation thereof and without exhausting the procedure provided in the contract for the settlement of grievances, the five strikes and work stoppages complained of had occurred, that the strikes and work stoppages were caused, authorized and condoned by the appellants and their officers and agents who, by reason thereof, had breached said contract, resulting in damage to the appellee in the sum of $6,000,000.

The appellants filed a motion to dismiss and in the alternative, a motion to stay the proceedings until arbitration of the matters complained of by the appellee shall have been had in accordance with the provisions of the U. S. Arbitration Act, Section 3, Title 9, U. S. Code. The Dis-

trict Judge denied both motions. This appeal is from that portion of the order which denied appellants' alternative motion to a stay pending arbitration. Sect. 1292(1) Title 28, U. S. Code; *Hoover Motor Express Co. v. Teamsters, Chauffeurs, etc.*, 217 F. (2d) 49, 51-52, C. A. 6th.

In the absence of a statute so providing, a party to a contract cannot as a matter of right have his differences or disputes with the other contracting party under the contract submitted to arbitration. There is no common-law right of arbitration. *Wolff Co. v. Industrial Court*, 262 U. S. 522; *Mengel Co. v. Nashville Paper Products & Specialty Workers Union*, 221 F. (2d) 644, 647, C. A. 6th. In some states he may acquire the right by such a provision in the contract, although in other states a provision requiring arbitration, while still executory, is not enforceable. *Gatliff Coal Co. v. Cox*, 142 F. (2d) 876, 881, C. A. 6th; *Red Cross Line v. Atlantic Fruit Co.*, 264 U. S. 109, 120-121. See: *Bernhardt v. Polygraphic Co.*, 350 U. S. 198, 203-205. Appellants' right to arbitrate the question of liability under the no-strike provision in the contract accordingly must depend upon the provisions of the contract. If the contract gives the right of arbitration, it is enforceable under the provisions of Sect. 3 of the *United States Arbitration Act*, Sect. 3, Title 9, U. S. Code. Sect. 3 of the Act provides:

> If any suits or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

It is appellants' contention that under paragraphs 1 through 6 of Article III of the collective bargaining agree-

ment the issues, tendered by the complaint are arbitrable issues, and being such, the court should grant a stay under Sect. 3 of the Arbitration Act. Whether this contention is sound depends upon the construction of the written contract. *Local 205, etc. v. General Electric Co.*, 233 F. (2d) 85, 101, C. A. 1st; *Annotation*, 24 A. L. R. (2d) pp. 757-761.

As a preliminary question, appellants urge upon us the proposition that the primary decision as to what is arbitrable should itself be left to an arbitrator operating under the contract, with the court confining itself to granting a stay pending the arbitrator's ruling on this issue and the arbitration itself, if the arbitrator decides the question is arbitrable under the contract. They contend that the arbitrator's ruling that the question is an arbitrable one can be reviewed by the court later at the same time when any award is brought before it for review. They point out that arbitration of disputes between management and labor is in the public interest in that it is conducive to bringing about the peaceful solutions of labor disputes, that the modern day approach to the problem favors such procedure, and that if the claim of the right to arbitrate is not frivolous or patently baseless, the final review of all questions by the court prevents irreparable injury to either party. They liken the power of the arbitrator to decide such an issue to the power of the court to pass on the question of its jurisdiction in a cause brought before it before passing on the merits.

Conceding for the purpose of argument the practical desirability of such a rule, it is not our province to put it into effect if it is contrary to settled principles of law. We are reminded that "history convinces us that the hoary though probably misguided judge-made reluctance to give full effect to arbitration and agreements cannot now be ignored by us as a matter of federal law without a pretty explicit statutory basis for so doing." *Local 205, etc. v. General Electric Company, supra*, 233 F. (2d) 85, 96, C. A. 1st. As pointed out in that case (p. 101), such a procedure can be provided by the arbitration agreement if the parties so desire, but whether they have done so is a prob-

lem of contract interpretation. As said in *Local 379, etc. v. Jacobs Mfg. Co.*, 120 F. Supp. 228, 231, D. C. Conn.: "Resolution of the 'jurisdiction-to-decide jurisdiction' must depend upon the provisions of the contract." If we recognize the settled rule that a party to a contract has no right to arbitrate a dispute under the contract unless the contract so provides, it seems to necessarily follow that he has no right to arbitrate the question of arbitrability unless the contract so provides. This is clearly the rule under the Arbitration Act, which provides in Sect. 3 that "the *court* in which such suit is pending, *upon being satisfied* that the issue involved . . . is referable to arbitration under such an agreement" shall stay the trial pending arbitration. (Emphasis added.) We are of the opinion that the question of whether an issue is an arbitrable one under a contract of arbitration is a legal question for the Court rather than for the arbitrator in the absence of a contract giving the arbitrator such jurisdiction. We do not find any such provision in the contract now under consideration. *Annotation*, 24 A. L. R. (2d) p. 760.

Proceeding to the question of whether the issue involved in this suit is referable to arbitration under the contract, we have difficulty in ascertaininng what the issue is. The appellants have filed no answer. Their motion for a stay and the affidavit in support of it does not state what the issue is. In the present state of the record liability is not denied either by a traverse or by confession and avoidance. Outside of the record, we were not able to ascertain in the oral argument of this appeal what issue would be presented to the arbitrator other than the amount of damages. Appellants contend that the word "issue" as used in the Act does not mean an issue made by the pleadings, but should be construed in its broad, common sense meaning of "claim," which is satisfied by reading the allegations of the complaint. *Donahue v. Susquehanna Collieries Co.*, 138 F. (2d) 3, 4, C. A. 3rd. Assuminng that the words "issue involved in such *suit*" (emphasis added) means merely an undenied, unsatisfied claim, about which we have some doubt, we are still not able to determine whether the claim is one "referable to arbitration" unless we know the

nature of the defense to it. If there is no valid defense and the failure or refusal to pay is merely an attempt to postpone the day of reckoning or possibly because of a present inability to pay, it would not be an arbitrable claim or issue. In some jurisdictions lack of good faith in presenting an alleged issue prevents the claim from being an arbitrable one. *Annotation*: 24 A. L. R. (2d) pp. 762-764.

If liability is to be denied, there are several possible defenses that might be asserted if supported by the facts, as yet unknown to us. In a suit for breach of contract possible defenses include invalidity of the contract, either as a matter of law, or because of lack of authority to execute the contract, or because of fraud or duress in its execution, or by mutual cancellation of the contract at a later time. Such defenses would not involve a "difference . . . between the Company and the union as to the meaning and application of this agreement" as provided in Article III, paragraph 1. *Annotation*: 24 A. L. R. (2d) pp. 767-769. Repudiation of the contract by the Company or admitted failure or refusal to perform its obligations thereunder are other possible defenses not involving the meaning of the contract. Breach of contract might be admitted, coupled with a denial that any damage was caused thereby, with the unions contending that the alleged loss of business was due to a change in business conditions, increased competition, mismanagement, or other shut-downs in no way connected with the strikes. The possible issues are numerous and varied, some referable to arbitration, others clearly not. The Arbitration Act requires the court to be "satisfied that *the issue involved* in such suit or proceeding is referable to arbitration . . ." (emphasis added), before a stay is granted. In the present state of the record, we are not so satisfied. *Metal Polishers, etc. v. Rubin*, 85 F. Supp. 362, E. D. Pa.

If we assume that an issue has been made which in some form denies liability for the strikes, we are nevertheless of the opinion that a proper construction of the contract provisions does not entitle the appellant to a stay pending arbitration.

Article III, paragraph 1; contains an unequivocal, unconditional obligation not to strike or engage in a work stoppage during the term of the contract. It recognizes that a "difference" might arise between the Company and the union which, if not settled, would lead to a strike. It looks to a settlement of that difference by use of the grievance procedure, but there is nothing in that paragraph which relieves the unions of their unconditional obligation not to have a strike. The "difference" or "grievance" is to be arbitrated to a final conclusion, but while it is being arbitrated and regardless of how it is eventually decided and terminated, there is to be no strike. The thing to be arbitrated is the "difference" or "grievance," not the right to strike or any claimed justification for the strike. There was no right to strike. The arbitration called for by this paragraph of the contract was to be used instead of a strike, not to determine whether the strike was justified after it had occurred. The right to strike was not arbitrable issue under this paragraph of the contract. *Shirley-Herman Co. v. Internat'l Hod Carriers, etc., supra*, 182 F. (2d) 806, 810, C. A. 2nd; *International Union, etc. v. Colonial Hardwood Flooring Co.*, 168 F. (2d) 33, 35 C. A. 4th; *United Electrical, R. & M. Wkrs. v. Miller Metal Products, Inc.*, 215 F. (2d) 221, 223, C. A. 4th; *Markel Electric Products Inc. v. United Electrical, R. & M. Wkrs.*, 202 F. (2d) 435, 437, C. A. 2nd. See also: *Cuneo Press v. Kokomo Paper Handler's Union No. 34*, 235 F. (2d) 108, C. A. 7th, cert. denied, 352 U. S. 912.

Appellants also rely upon Article III, paragraph 6, of the contract, which reads as follows:

> In the event a grievance relating to the meaning or application of this Agreement is not satisfactorily disposed of in the foregoing steps of the grievance procedure, either party may submit the unsettled grievance to an impartial arbitrator agreed upon by them, provided notice is given to the opposite party within fifteen (15) days after the Shop Committee-Management meeting (above referred to) of intention to arbitrate. The parties shall bear equally the expenses of arbitration. The Arbitrator shall have no

> power to add to, ignore or modify any terms of this Agreement. His decision shall be final and binding upon both parties to this Agreement.

They contend that the alleged breach of the no-strike agreement is a "grievance relating to the meeting or application" of the agreement, which under said paragraph is an arbitrable issue. This court has previously considered this question. We said in *Hoover Motor Express Co. v. Teamsters, Chauffeurs, etc., supra*, 217 F. (2d) 49, 53-54, C. A. 6th, "In the commonly accepted meaning of the term 'grievance' violation of a no-strike provision in a collective bargaining agreement does not constitute a grievance" and "the violation of the no-strike agreement of the collective bargaining contract is not a grievance." Other courts have also so held. *International Union, etc. v. Colonial Hardwood Flooring Co., supra*, 168 F. (2d) 33 C. A. 4th; *Harris Hub Bed & Spring Co. v. United Electrical, R. & M. Wkrs.*, 121 F. Supp. 40, 43, M. D. Pa.; *Bassick Company v. Bassick Local 229*, 126 F. Supp. 777, 779, D. C. Conn.

Paragraph 6 of Article III must be read in conjunction with the preceding paragraphs 1-5 of the Article. Paragraph 1 provides that the parties shall in all instances "resort to the following steps of the grievance procedure." Paragraphs 2-6 are the "following steps." Paragraph 2 provides: "Any *employe* having a grievance shall first submit the same to the steward of his department or to his foreman." (Emphasis added.) Paragraphs 3, 4 and 5 deal wtih successive proceedings if the grievance is not settled at different levels of negotiations, using the term "the unsettled grievance" and any grievance which "cannot be settled." Paragraph 6, as hereinabove set out, finally provides for the submission of "the unsettled grievance to an impartial arbitrator." The grievance referred to in paragraphs 2-6 is a grievance on the part of an employe against the employer, not a grievance by the employer against the union. There is nothing in paragraphs 2-6 inclusive which provides for arbitration of a claim for damages by the *employer* against the union. *Square D. Co.*

v. United Electrical, R. & M. Wkrs., 123 F. Supp. 776, 783, E. D. Mich.

There being nothing in the collective bargaining agreement which gives the appellants the right to submit to arbitration the question of its liability for the claimed breach of its no-strike obligation, the U. S. Arbitration Act has no application and the stay order was properly denied. *Hoover Motor Express Co. v. Teamsters, Chauffeurs, etc., supra*, 217 F. (2d) 49, 54, C. A. 6th.

The judgment is affirmed.

STATUTES INVOLVED

* * * * *

29 U. S. C. 171 (Sec. 201):

SEC. 201. That it is the policy of the United States that—

(a) sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interests of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees;

(b) the settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for conciliation, mediation, and voluntary arbitration aid and encourage employers and the representatives of their employees to reach and maintain agreements concerning rates of pay, hours and working conditions, and to make all reasonable efforts to settle their differences by mutual agreement reached through conferences and collective bargaining or by such methods as may be provided for in any applicable agreement for the settlement of duties; and

(c) certain controversies which arise between parties to collective-bargaining agreements may be avoided or minimized by making available full and adequate governmental facilities for furnishing assistance to employers and the representatives of their employees in formulating for inclusion within such agreements provision for adequate notice of any proposed changes in the terms of such agreements, for the final adjustment of grievances or questions regarding the application or interpretation of such agreements, and other provisions designed to prevent the subsequent arising of such controversies.

* * * * *

29 U. S. C. 173(d) (Sec. 203):

Sec. 203.

(a) It shall be the duty of the Service, in order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, to assist parties to labor disputes in industries affecting commerce to settle such disputes through conciliation and mediation.

(b) The Service may proffer its services in any labor dispute in any industry affecting commerce, either upon its own motion or upon the request of one or more of the parties to the dispute, whenever in its judgment such dispute threatens to cause a substantial interruption of commerce. The Director and the Service are directed to avoid attempting to mediate disputes which would have only a minor effect on interstate commerce if State or other conciliation services are available to the parties. Whenever the Service does proffer its services in any dispute, it shall be the duty of the Service promptly to put itself in communication with the parties and to use its best efforts, by mediation and conciliation, to bring them to agreement.

(c) If the Director is not able to bring the parties to agreement by conciliation within a reasonable time, he shall seek to induce the parties voluntarily to seek other means of settling the dispute without resort to strike, lockout, or other coercion, including submission to the employees in the bargaining unit of the employer's last offer of settlement for approval or rejection in a secret ballot. The failure or refusal of either party to agree to any procedure suggested by the Director shall not be deemed a violation of any duty or obligation imposed by this Act.

(d) Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing

collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

* * * * *

29 U. S. C. 185 (Sec. 301):

Sec. 301.

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpoena, or other legal process of any court of the United States upon

an officer or agent of a labor organization, in his capacity as such shall constitute service upon the labor organization.

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

* * * * *

9 U. S. C. 3:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration. July 30, 1947, c. 392, §1, 61 Stat. 669.

* * * * *

9 U. S. C. 4:

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any court of the United States which, save for such agreement, would have jurisdiction under the judicial code at law, in equity, or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by law for the service of summons in the jurisdiction in which the proceeding is brought. The court shall hear the parties,

and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by law for referring to a jury issues in an equity action, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof. July 30, 1947, c. 392 §1, 61 Stat. 669.

SUPREME COURT, U.S.
Office - Supreme Court, U.S.
FILED
JUL 17 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 102[illegible]137

INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW-AFL-CIO),
and
BENTON HARBOR MALLEABLE LOCAL No. 880 of International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-AFL-CIO),
Petitioners,
v.
BENTON HARBOR MALLEABLE INDUSTRIES,
Respondent

REPLY MEMORANDUM OF PETITIONER

HAROLD A. CRANEFIELD,
KURT L. HANSLOWE,
REDMOND H ROCHE, JR.,
Attorneys for Petitioners,
8000 East Jefferson Avenue,
Detroit 14, Michigan.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 1028

INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW-AFL-CIO),

and

BENTON HARBOR MALLEABLE LOCAL No. 880 of International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-AFL-CIO),

Petitioners,

v.

BENTON HARBOR MALLEABLE INDUSTRIES,

Respondent

REPLY MEMORANDUM OF PETITIONER

OPINION BELOW

Since the petition for certiorari was filed, the opinion below has been reported at 242 F. 2d 536.

REPLY MEMORANDUM OF PETITIONER

Respondent appears to confine its serious opposition to the petition to its contention that the decision below basically rests on its facts and is distinguishable from all other decisions in which a stay pending arbitration is sought, including *Signal-Stat Corporation v. United Electrical Workers*, 235 F. 2d 298 (C. A. 2, 1956); cert. denied June 10, 1957, 25 LW 3366, Docket #520, October 1956 Term, petition for rehearing pending. In support of this position, respondent attempts to set up a straw man in its out-of-context quote from the petition appearing in respondent's Brief in Opposition, at page 4, which respondent then proceeds to demolish with a quotation from the opinion below. Of course, petitioner does not, and could not, contend that the decision below would result in the denial of a stay under any and all circumstances. Obviously, if the contract specifically provided for arbitration of a breach of the no-strike clause, application of the decision below would have resulted in the Court granting the stay.

Respondent's entire discussion is peripheral. As we have stated on page 9 of our petition, we are not concerned with the propriety of a stay under any and all circumstances, and, indeed, no such universally applicable rule could conceivably be formulated in view of the diversity of language in various contracts. We do, however, contend that in the numerous contracts which contain general arbitration provisions providing for arbitration of differences as to the meaning and application of the agreement, the Courts of Appeal are in basic conflict in that the Sixth Circuit below held, on the basis of a generally restrictive approach, that a contract containing such general language did not provide the basis for a stay pending arbitration of

a suit alleging breach of the no-strike clause, while the Second Circuit, in *Signal-Stat Corporation v. United Electrical Workers, supra*, held that a contract containing such general language did provide the basis for such a stay. Respondent's strained attempt to reconcile the decision below with that in *Signal-Stat* does not, and could not, obscure this basic area of conflict.

In *Textile Workers Union of America v. Lincoln Mills of Alabama*, 77 Sup. Ct. 912, and related cases, this Court very recently stressed the importance of arbitration in collective bargaining contracts, and clarified one area of application of abritration to these agreements. These decisions did not, however, clarify the second basic area of confusion and conflict which exists with regard to these arbitration provisions; i.e., whether they will be restrictively or liberally interpreted and applied. The fact that review of this case would require the court to consider certain terms and provisions of a particular contract is irrelevant to the considerations normally governing issuance or denial of a petition for certiorari. In fact, the approach of the various federal courts to general arbitration provisions in collective bargaining contracts cannot be made to conform in any other way. In *Wilkerson v. McCarthy*, 336 U. S. 53 (1949), Mr. Justice Douglas' concurring opinion emphasizes the necessity in some cases of reconciling differing basic approaches of courts leading inevitably to inconsistent results through granting certiorari in certain selected cases which highlight the difference in basic approaches. The appendix to this concurring opinion lists the numerous cases in which the Court granted certiorari in order to finally construct a definitive basic approach which lower courts should follow in application of the Federal Employers Liability Act, 35 Stat. 65, as amended; 36 Stat. 291 and 53 Stat. 1404, 45 U. S. C. 51-60. No such extensive exercise of this Court's certiorari powers would

be necessary in order to definitively clarify the broad approach to interpretation and application of arbitration clauses which this Court, in *Textile Workers Union v. Lincoln Mills of Alabama*, *supra*, has so recently indicated it favors. Granting of the petition sought herein, possibly in conjunction with granting of the petition for rehearing currently pending in *Signal-Stat v. United Electrical Workers*, *supra*, would unquestionably provide the clarification so necessary to lower courts and the bar to prevent a continuation of the conflicting and inconsistent results in the various circuits arising out of motions for stays pending arbtiration under substantially identical contract containing general arbitration provisions. As Mr. Justice Douglas has stated in *Stare Decisis*, *49 Columbia Law Review*, 735, 752 (1949), exercise of this Court's discretionary power to grant writs of certiorari in cases superficially appearing to rest on specific fact situations is necessary, from time to time, to correct "an indifferent or unfriendly attitude [which has] permeated [lower courts] with a philosophy hostile to that reflected in the legislation", in this case the United States Arbitration Act, 61 Stat. 669, 9 U. S. C. Section 1, *et seq.*

In addition, while petitioner feels that the Court below was correct in that phase of the decision which held that the United States Arbitration Act applied to collective bargaining contract, there can be little question that an additional element of confusion was injected into those suits in which stays pending arbitration are sought by this Court's avoidance of that question in *Textile Workers Union v. Lincoln Mills of Alabama*, *supra*, and related cases, and that portion of Mr. Justice Frankfurter's dissenting opinion in those cases in which he concludes that the majority implicitly rejects application of the Arbitration Act to collective bargaining agreements, 77 Sup. Ct. 923, 926.

Petitioner therefore respectfully requests this Court to grant certiorari in this case in order that the bench and the bar might be provided authoritative guidance as to the proper application of general provisions of arbitration clauses in collective bargaining contracts, particularly as they are raised by motions of defendants to stay proceedings pending arbitration in numerous and important cases.

Respectfully submitted,

HAROLD A. CRANEFIELD,
KURT L. HANSLOWE,
REDMOND H. ROCHE, JR.,
Attorneys for Petitioners,
8000 E. Jefferson,
Detroit 14, Michigan.

Date: July 10, 1947.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1956

No. ~~1028~~ 131

INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW-AFL-CIO),

and

BENTON HARBOR MALLEABLE LOCAL No. 880 of International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-AFL-CIO),

Petitioners,

vs.

BENTON HARBOR MALLEABLE INDUSTRIES,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

VICTOR L. LEWIS
105 South LaSalle Street
Chicago 3, Illinois
ELDEN W. BUTZBAUGH
172 East Main Street
Benton Harbor, Michigan
Attorneys for Respondent

VEDDER, PRICE, KAUFMAN & KAMMHOLZ
105 South LaSalle Street
Chicago 3, Illinois
BUTZBAUGH, PAGE & BYRNS
172 East Main Street
Benton Harbor, Michigan
Of Counsel

June 1957

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In The

Supreme Court of the United States

October Term, A. D. 1956.

No. 1028

INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW-AFL-CIO),

and

BENTON HARBOR MALLEABLE LOCAL No. 889 of International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-AFL-CIO),

Petitioners,

vs.

BENTON HARBOR MALLEABLE INDUSTRIES,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

Opinions Below

The opinion of the District Court is not reported. It is printed in the record pages 20a to 28a. The opinion of the Court of Appeals is reported at 242 F. 2d 536, and also appears at 39 L.R.R.M. 2689 and in the Appendix to the petition pages 1b to 9b.

Jurisdiction

Petitioners are seeking to invoke the jurisdiction of this Court under 28 U.S.C. 1254. Petitioners' application for certiorari is required (28 U.S.C. 2101(c)) to be made within ninety days after entry of judgment by the Court of Appeals on March 29, 1957. Petition for certiorari was served upon attorneys for respondent on May 23, 1957.

Statutes Involved

Section 3 of the United States Arbitration Act (9 U.S.C. 3, 61 Stat. 669):

> "If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

Questions Presented

1. As a matter of contract interpretation, were petitioners entitled to a stay under Section 3 of the Arbitration Act because the issue involved in respondent's suit for breach of contract damages was referable to arbitration under the terms of the particular collective bargaining agreement?

2. Was it the court's (rather than an arbitrator's) function to determine whether or not the issue involved in respondent's suit for breach of contract damages was referable to arbitration?

Statement

On February 26, 1952, respondent, an employer, and petitioners, labor unions, entered into a collective bargaining agreement, pertinent sections of which are set forth in pages 8a through 13a of the record.

Subsequently, respondent filed this action in the District Court for the Western District of Michigan under Sec. 301(a) of the Labor Management Relations Act 1947, (29 U.S.C. 185(a)) against petitioners to recover damages for breach of the no-strike clause of the agreement (R. 2a-7a). Petitioners filed a motion to dismiss (not pertinent here) or in the alternative, relying on Section 3 of the Arbitration Act (R. 17a):

> "To stay the proceedings in this action until arbitration of the of the [*sic*] matters complained of by plaintiff shall have been had on the ground that the complaint tenders only issues which are referable to arbitration under an agreement in writing between the plaintiff and defendants * * *."

The District Court denied petitioners' motion to stay the proceedings pending arbitration (R. 1a), and the Court of Appeals for the Sixth Circuit affirmed. Both courts were of the opinion that petitioners were not entitled to a stay because the agreements between the parties, as a matter of contract construction, did not provide for arbitration of the issues involved in respondent's suit for damages for breach of contract. Both courts were also of the opinion that it was for the court and not an arbitrator to decide whether, as a matter of contract interpretation, the issue in respondent's suit for damages was referable to arbitration.

ARGUMENT.

1. The basic question in this case is whether the particular collective bargaining agreement, as a matter of contract construction, provides for arbitration of respondent's claim for damages occasioned by strikes and work stoppages in violation of that agreement. The answer to that question determines whether or not petitioners were entitled to a stay under Section 3 of the Arbitration Act (9 U.S.C. 3). Both the District Court and the Court of Appeals found that the agreement does not so provide. The Court of Appeals predicated its holding upon the absence of anything "in the collective bargaining agreement which gives the appellants the right to submit to arbitration the question of its liability for the claimed breach of its no-strike obligation . . ." (Pet. 9b). The Sixth Circuit did not hold, as petitioner states, that "an arbitration clause in . . . a contract, regardless of the generality of its wording, [does] not apply to that class of alleged breaches which involved the strike lock-out clause" (Pet. 5). On the contrary, the Sixth Circuit recognized that the question was one of contract interpretation, and that "if the contract gives the right of arbitration, it is enforceable under the provisions of Sec. 3 of the United States Arbitration Act . . ." (Pet. 3b).

This Court has had occasion to remind the bar that it will not grant certiorari to review evidence and discuss facts,[1] and has refused to grant certiorari where these are the only issues presented. *General Talk. Pictures Co. v. Western El. Co.*, 304 U.S. 175, 178 (1938). *Southern Power*

[1] See, *e.g.*, Frankfurter, J., dissenting in *Rogers v. Missouri Pacific Railroad Co.*, 1 L. ed. 2d 493, 515 (1957).

Co. v. North Carolina Public Serv. Co., 263 U.S. 508 (1924); *Houston Oil Co. v. Goodrich*, 245 U.S. 440 (1918). This rule and the reasons which support it are applicable to this case.

Reduced to its essence, it is petitioners' contention that the courts below misinterpreted the meaning of their contract with respondent. The contract provision in question is not a standard contract provision. Every contract provision of this type necessitates an independent determination of the meaning of its specific language. A decision construing one contract cannot have any general application to other collective bargaining agreements containing different terms. The various district courts and courts of appeals which have decided motions for stays under Section 3 of the Arbitration Act have rested their decisions upon their interpretations of the language in the contracts under consideration.[2] Such individual determinations inevitably yield differing conclusions, sometimes resulting in a stay pending arbitration and sometimes denying it. To reason from these differing results, occasioned by con-

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[2] *United Electrical, R. & M. Wkrs. v. Miller Metal Prods.*, 215 F. 2d 221 (C.A. 4, 1954); *International Union v. Colonial Hardwood Floor Co.*, 168 F. 2d 33 (C.A. 4, 1948); *Markel Electric Prod. v. United Electricel, R. & M. Wkrs.*, 202 F. 2d 435 (C.A. 2, 1953); *Signal-Stat Corporation v. Local 475, etc.*, 235 F. 2d 298 (C.A. 2, 1956), cert. den. June 10, 1957; *Square D Co. v. United Electrical, Radio & Mach. Wkrs.*, 123 F. Supp. 776, (E.D. Mich., 1954); *Harris Hub Pad & Spring Co. v. United Elec., R. & M. Wkrs.* 121 F. Supp. 40 (M.D. Pa., 1954); *Bassick Co. v. Bassick Local 229*, 126 F. Supp. 777 (D. Conn. 1954); *Metal Polishers, Etc. v. Rubin*, 85 F. Supp. 363 (E.D. Pa., 1949).

In *Ingersoll Products Division v. United Farm, Etc. Wkrs.*, 34 L.R.R.M. 2174, 2176 (N.D. Ill., 1954), the district judge said:

> "A number of cases are cited which both include and reject arbitration for controversies analogous to that at bar. In each case the conclusion is referable to the language and context of the particular agreement. Every such situation is unique and no purpose would be served in reviewing the decisions."

tracts with divergent phraseology, that any conflict exists among the courts of appeals as to the "basic approach of federal courts to arbitration provisions in collective bargaining contracts" (Pet. 5) is fallacious. Certainly the Sixth Circuit has not manifested any judicial aversion to enforcing arbitration agreements.[3]

Although the statutory restraints on certiorari to the highest court of a State (28 U.S.C. 1257) differ somewhat from the criteria established by this Court for review on writ of certiorari to a court of appeals, it is significant that this Court dismissed a writ of certiorari in *Black* v. *Cutter Laboratories*, 351 U.S. 292 (1956), for the reason that the only issue involved was the State's "construction of a local contract under local law" (p. 299). Respondent submits that the same considerations present in the *Cutter Laboratories* case, coupled with the more extensive judicial discretion on writs of certiorari to a court of appeals, warrant a refusal by this Court to grant certiorari in this case.

Petitioners urge that there is a conflict between this decision of the Sixth Circuit and the decision of the Second Circuit in *Signal-Stat Corp.* v. *Local 475, etc.*, 235 F. 2d 298 (C.A. 2, 1956), cert. den. June 10, 1957 (Pet. 8-9). An examination of the decisions discloses no such conflict. The Second Circuit also recognized that the grant or denial of a stay for arbitration depends on the specific language of the applicable collective bargaining agreement. In the *Signal-Stat* case the Second Circuit, speaking through Judge Frank, held that a contract provision stating that "*All* disputes, grievances or differences" are arbitrable, necessitated a submission to arbitration of a dispute arising from an alleged breach of a no-strike clause. Because of the difference in phraseology the *Signal-Stat* opinion

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[3] See, *e.g.*, *Local 70, Warehouse, etc.* v. *Buckeye Cotton Oil Co.*, 236 F. 2d 776 (C.A. 6, 1956), cert. den. June 10, 1957.

distinguished the same Circuit's decision in *Markel Electric Prod.* v. *United Electrical, R. & M. Wkrs.*, 202 F. 2d 435, 436-37 (C.A. 2, 1953), where it had held that a contract provision requiring arbitration of any difference "between the Company and any employee" did not require submission to an arbitrator of the issue of the defendant union's breach of a no-strike clause. In the present case, the Sixth Circuit construed a contract provision for submission to arbitration of any "grievance relating to the meaning or application of this agreement . . . not satisfactorily disposed of in the foregoing steps of the grievance procedure" as not calling for arbitration of the issue involved in respondent's suit for damages for breach of the no-strike clause (Pet 7b-8b). Far from presenting a conflict, it can be said that the Second and Sixth Circuits are in agreement because the contract provision in *Markel* is more comparable to the one in the present case than is the contract provision in *Signal-Stat*.

2. Petitioners contend that the question as to whether the issue involved in this suit is referable to arbitration under the written agreement should be referred to arbitration. The Sixth Circuit concluded that the agreement under consideration in this case contains no provision giving the arbitrator such jurisdiction (Pet. 5b).

Petitioners assert that this holding conflicts with that of the First Circuit in *Local 205, etc.* v. *General Electric Company*, 233 F. 2d 85 (C.A. 1, 1956), aff'd June 3, 1957, 40 LRRM 2119. However, the Sixth Circuit appears to be in complete agreement with the First Circuit in holding that the contract itself determines whether the arbitrator or the court is to decide the issue of arbitrability. The Sixth Circuit, after citing the *General Electric* case (Pet. 4b-5b), said:

"As pointed out in that case (p. 101), such a procedure can be provided by the arbitration agreement if the parties so desire, but whether they have done so is a problem of contract interpretation."

The decision of the Sixth Circuit on the jurisdiction-to-decide-jurisdiction question can stand, independent of any other ground, on contract interpretation, and thus is clearly in accord with the views of the First Circuit. Even to the extent that the Sixth Circuit supports its position by reference to the particular requirement of Section 3 of the Arbitration Act[1] (Pet. 5b), it is not in conflict with the First Circuit. In the *General Electric* case Judge Magruder was dealing with Section 4 of the Arbitration Act in a suit to compel arbitration, and his dictum quoted in the Petition (p. 15) was made in the course of a discussion which obviously did not take into consideration the peculiar requirement in Section 3.

3. Finally, petitioners argue (Pet. 17-20) that there is involved in the Sixth Circuit's decision "its determination that the issues involved in respondent's claim of alleged breaches of the strike-lockout prohibition clause were insufficiently defined" (Pet. 17), and that such determination conflicts with the Second and Third Circuit cases of *Shanferoke Coal & Supply Co.* v. *Westchester S. Corp.*, 70 F. 2d 29 (C.A. 2, 1934), aff'd 293 U.S. 449 (1935), and *Donahue* v. *Susquehanna Collieries Co.*, 138 F. 2d 3 (C.A. 3, 1943). It is true that the Sixth Circuit said it had "difficulty in ascertaining what the issue is" (Pet. 5b), but the decision does not depend upon that difficulty alone, nor does it reject or conflict with the views of the Second

[1] Section 3 of the Arbitration Act provides that "the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, etc."

and Third Circuits. The Sixth Circuit's holding is that, assuming an issue has been made which in some form denies liability for the strikes, "a proper construction of the contract provisions does not entitle the appellants to a stay pending arbitration." (Pet. 6b) and there is "nothing in the collective bargaining agreement which gives the appellants the right to submit to arbitration the question of its liability for the claimed breach of its no-strike obligation" (Pet. 9b). That holding is consistent with the decisions of the Second and Third Circuits.

CONCLUSION

For the foregoing reasons respondent respectfully submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

VICTOR L. LEWIS

ELDEN W. BUTZBAUGH

Attorneys for Respondent

VEDDER, PRICE, KAUFMAN & KAMMHOLZ
BUTZBAUGH, PAGE & BYRNS
Of Counsel

June, 1957